SELECTED GUIDELINE APPLICATION DECISIONS FOR THE NINTH CIRCUIT JANUARY 1994-October 1998

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Table of Contents

Page

Page

Table of Authorities

Page

Page

U.S. SENTENCING COMMISSION GUIDELINES MANUAL
CASE ANNOTATIONS—NINTH CIRCUIT

CHAPTER ONE: *Introduction and General Application Principles*

Part A Introduction

United States v. Lam, 20 F.3d 999 (9th Cir. 1994). The district court did not err in declining to extend the reduction for failure to register a firearm where the firearm was used only for sporting or collection purposes to firearms used for self-defense. The fact that self-defense is a lawful use does not mitigate the defendant's registration offense. However, the district court erred in finding that it did not have the discretion to depart downward for the defendant's aberrant behavior. A number of convergent factors, such as the defendant's lack of criminal history, the fact that he obtained the weapon to protect his family after they had been robbed at their place of business, and his unfamiliarity with registration requirements, created aberrant circumstances where a downward departure could have been considered.

United States v. Mukai, 26 F.3d 953 (9th Cir. 1994). The district court erred in departing downward based on its conclusion that "exceptional circumstances" justified disregarding the terms of the defendant's accepted Rule 11(e)(1)(C) plea agreement. The circuit court, citing Ninth Circuit precedent, reasoned that while an "exceptional case" may occasionally warrant a downward departure after initial sentencing, such a reduction may only be granted in response to a Rule 35(b) motion. Here, the defendant made no Rule 35(b) motion. The circuit court rejected the defendant's argument that the government's §5K1.1 motion gave the sentencing court discretion to depart downward "as much as it deemed appropriate without regard for the terms of the agreement." The Ninth Circuit, citing to the Second Circuit's decision in United States v. Cunavelis, 969 F.2d 1419 (2d Cir. 1992), as well as the sentencing guidelines and legislative history of Rule 11, held that the dictates of Rule 11 trump the discretion afforded the district court under USSG §5K1.1.

Part B General Application Principles

United States v. Merino, 44 F.3d 749 (9th Cir. 1994), *cert. denied*, 514 U.S. 1086 (1995). The district court did not err in applying the guidelines to the defendant's conviction for repeated flights to avoid trial in violation of the Unauthorized Flight to Avoid Prosecution (UFAP) provisions in 18 U.S.C. § 1073, even though the defendant's first flight occurred prior to the guidelines' effective date. The appellate court relied on United States v. Gray, 876 F.2d 1411, 1418 (9th Cir. 1989), *cert. denied*, 495 U.S. 930 (1990) to conclude that UFAP is a continuing offense and thus subject to the guidelines if any portion of the offense occurred after the guidelines' effective date. In Gray, the circuit court held that failure to appear for sentencing is a continuing offense. The appellate court noted that UFAP is a continuing offense because of the "threat to the integrity and authority of the court" posed by a recalcitrant defendant who refuses to abide by lawful orders.

§1B1.2 Applicable Guidelines

United States v. Mun, 41 F.3d 409 (9th Cir. 1994), *cert. denied*, 514 U.S. 1077 (1995). The district court did not err by holding that it need not find intent to kill by a higher standard of proof than a preponderance of the evidence before it can cross-reference to attempted murder. *See* Braxton v. United States, 500 U.S. 344 (1991). The defendant argued that the district court should have applied Braxton when it interpreted the sentencing guidelines. The Ninth Circuit disagreed with the defendant and held that Braxton involved cross-referencing pursuant to USSG §1B1.2(a), rather than §2K2.1(c)(2). The inquiry made in that case concerned stipulated facts, and is not applicable in this case where facts are found after an evidentiary hearing. Because USSG §2K1.2(c)(2), not §1B1.2(a), was applicable to the defendant's case, the district court properly cross-referenced attempted murder when setting the defendant's offense level. The defendant also argued that the policy behind the sentencing guidelines and due process was violated when the district court refused to change his federal sentence to run concurrently with his state court sentence for the same underlying conduct. A defendant has no due process right to serve his state and federal sentences concurrently. The state court specifically ordered its sentence to be consecutive to any federal sentence. As a matter of comity, the federal courts would not modify the federal sentence to defeat the state court's sentence.

§1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

United States v. Cruz-Medoza, 147 F.3d 1069 (9th Cir. 1998). The court of appeals determined that a section of Amendment 518 made a substantive change to the guidelines and therefore could not be applied retroactively. The relevant portion of Amendment 518 provides that, in a reverse sting, the court shall exclude from relevant conduct the amount that the defendant did not intend to produce and was not reasonably capable of producing. An earlier decision, United States v. Felix, 87 F.3d 1057 (9th Cir. 1996), had held that another section of Amendment 518, regarding completed transactions, was a retroactive clarifying amendment.

United States v. Luna, 21 F.3d 874 (9th Cir. 1994). The district court properly enhanced defendant Torres' offense level for serious bodily injury pursuant to USSG §2B3.1(b)(3)(A). Torres argued that the enhancement was inappropriate because he did not cause the injury to the bank manager and it was not a foreseeable consequence of the robbery. The circuit court disagreed. Application Note 2 to USSG §1B1.3 illustrates that assaultive conduct which is committed "in furtherance of jointly undertaken criminal activity [is] reasonably foreseeable in connection with that criminal activity (given the nature of the offense)."

United States v. Rose, 20 F.3d 367 (9th Cir. 1994). The district court properly included as relevant conduct the monies derived from the wire fraud counts in determining the offense level for the defendants' money laundering offenses. The defendants argued that United States v. Taylor, 984 F.2d 298 (9th Cir. 1993) precluded the grouping of the wire fraud and money laundering counts because the two types of offenses involve different measurements of harm. *See also* United States v. Johnson, 971 F.2d 562 (10th Cir. 1993). The circuit court distinguished Taylor and Johnson on factual grounds; unlike the instant case, the funds derived from the wire fraud were not duplicative of the monies involved in the money laundering scheme. Only a portion of the wire fraud funds in Taylor and Johnson were subsequently laundered which

prohibited the government from recharacterizing the money derived from the wire fraud as money laundered for relevant conduct purposes. Here, however, the funds involved in the wire fraud were a "mere subset" of the amounts involved in the money laundering. Where the funds retain more than a "partial identity" throughout the wire fraud and the money laundering schemes, the grouping rules apply and it is proper to consider the wire fraud amounts when determining the offense level under §2S1.1.

United States v. Watts, 519 U.S. 148 (1997). The Supreme Court ruled that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." The Court granted the Government's petition pursuant to Supreme Court Rule 12.4, and issued this *per curiam* opinion resolving a split in the Circuit Courts of Appeals by reversing the Ninth Circuit's holding in United States v. Watts, 67 F.3d 790 (9th Cir. 1995), and United States v. Putra, 78 F.3d 1386 (9th Cir. 1996). Only the Ninth Circuit had refused to permit consideration of acquitted conduct. The Court held that the guidelines did not alter the sentencing court's discretion granted by statute at 18 U.S.C. § 3661, which provides that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." citing Witte v. United States, 515 U.S. 389, 402 (1995) (quoting United States v. Wright, 873 F.2d 437, 441 (1st Cir. 1989) (Breyer, J.) ("very roughly speaking, [relevant conduct] corresponds to those actions and circumstances that courts typically took into account when sentencing prior to the Guidelines' enactment."). The Supreme Court noted that guideline §1B1.4 "reflects the policy set forth in 18 U.S.C. § 3661" and that the commentary to guideline §1B1.3 also provides that "[c]onduct that is not formally charged or is not an element of the offense of conviction may enter into the determination of the applicable guideline sentencing range," and that all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction (relevant conduct) must be considered whether or not the defendant had been convicted of multiple counts. The Ninth Circuit's opinions also seemed to be based "on erroneous views of our double jeopardy jurisprudence," in asserting that a jury verdict of acquittal "rejects" facts. *See* Dowling v. United States, 493 U.S. 342, 349 (1990) ("an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof").

§1B1.10 Retroactivity of Amended Guideline Ranges (Policy Statement)

United States v. Felix, 87 F.3d 1057 (9th Cir. 1996). The court erred by failing to apply USSG §2D1.1, Application Note 12 retroactively for the purpose of calculating drug amounts at sentencing. The court noted that the prior version of note 12 applied only to incomplete transactions, in which the amount under negotiation would determine a defendant's sentence, unless evidence indicated that the defendant was unwilling or incapable of producing the amount. The appropriate amount of drugs for consideration in a completed transaction was ambiguous, because the court could base its sentence upon either the amount negotiated or delivered. In contrast to the prior version of Note 12 which was silent with respect to the calculation of sentences for completed transactions, the current version of Note 12 specifies the amount to be considered with respect to a completed transaction. The circuit holds that the current version of

Application Note 12 should be treated as a clarifying amendment and given retroactive effect. The sentencing court should consider first whether the transaction is completed and then whether the amount delivered more accurately reflects the scale of the offense than the amount negotiated. In this case, the court noted that the transaction was completed because the cocaine was present at the negotiation and all conspirators were ready to sell the cocaine. The amount of cocaine delivered was easily calculated and no further delivery was contemplated. The sentence should be calculated based upon the amounts of drugs seized because it accurately reflects the scale of the offense.

United States v. Sanders, 67 F.3d 855 (9th Cir. 1995). The Ninth Circuit reversed the district court's imposition of consecutive terms of supervised release pursuant to a 1994 amendment which "makes clear that supervised release terms are not to run consecutively, even in cases where punishments for the underlying crimes must be imposed consecutively." The defendant was originally sentenced to two consecutive terms of supervised release after pleading guilty to bank robbery and using a firearm during a crime of violence. The circuit court noted that at the time of the defendant's sentencing, Ninth Circuit precedent allowed consecutive terms of supervised release. *See* United States v. Shorthouse, 7 F.3d 149 (9th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994). In Shorthouse, the Ninth Circuit had held that a statute requiring the imposition of consecutive sentences would not be trumped by 18 U.S.C. § 3624(e), which provides that supervised release terms are to be concurrent. A 1994 amendment to the sentencing guidelines resolved a split in the circuits, and clarified the commentary to USSG §5G1.2, stating that supervised release terms are to be imposed concurrently. The Ninth Circuit ruled that defendants who now face sentencing for crimes mandating the imposition of consecutive sentences will not receive consecutive terms of supervised release. The circuit court held that as a clarifying amendment, the amendment retroactively applied to the defendant's sentence, and remanded the case to the district court for resentencing.

§1B1.11 Use of Guideline Manual in Effect at Sentencing

United States v. Bernard, 48 F.3d 427 (9th Cir. 1995). The district court did not violate the ex post facto clause when it relied on Application Note 4 to interpret USSG §5G1.3. The defendant challenged the district court's imposition of a sentence to run consecutive to the sentence the defendant was already serving for violating his supervised release. The circuit court ruled that Application Note 4 "merely makes explicit what was otherwise implicit in the operation of §5G1.3(b) and §5G1.3(c)" which is that the sentence for any offense committed while on supervised release is to be served consecutive to the sentence for the supervised release violation in order to "achieve reasonable incremental punishment." The circuit court held that Application Note 4 confirms a sound prior interpretation of section 5G1.3 and does not violate the ex post facto clause. *See* United States v. Glasener, 981 F.2d 973 (8th Cir. 1992); United States v. Flowers, 13 F.3d 395 (11th Cir. 1994).

Hamilton v. United States, 67 F.3d 761 (9th Cir. 1995). The district court violated the ex post facto clause in sentencing the defendant under the 1993 guidelines in effect at the time of resentencing. The defendant was originally sentenced as a career offender after pleading guilty to being a felon in possession of a firearm. In 1993, the defendant appealed his sentence based on Amendment 433, which provides that "the term `crime of violence' does not include the offense of

unlawful possession of a firearm by a felon." At resentencing, although the defendant was not sentenced to USSG §2K2.1 of the 1993 version of the guidelines, which resulted in a sentencing range of 77 to 96 months instead of the 12 to 18 months under the 1989 version of the guidelines. The defendant argued on appeal that he should be resentenced according to the 1988 guidelines but also pursuant to Amendment 433. The circuit court noted its previous holding in United States v. Garcia-Cruz, 40 F.3d 986, 990 (9th Cir. 1994), that "where the application of the amended guidelines results in a harsher sentence, the sentencing court is to apply the guidelines in effect at the time of the offense, but also must consider the clarification provided by Amendment 433." The court ruled that the defendant was entitled to be sentenced by the guidelines in effect at the time of the offense as they are affected by the retroactive application of Amendment 433.

§1B1.12 Persons Sentenced Under the Federal Juvenile Delinquency Act (Policy Statement)

United States v. Doe, 53 F.3d 1081 (9th Cir. 1995). The sentencing guidelines do not apply to a defendant sentenced under the provisions of the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042. In considering an issue of first impression, the appellate court held that an adjudicated juvenile delinquent may not be sentenced to a term of supervised release.

CHAPTER TWO: *Offense Conduct*

Part A Offenses Against The Person

§2A2.2 Aggravated Assault

United States v. Dayea, 32 F.3d 1377 (9th Cir. 1994). The district court erred in applying a dangerous weapon enhancement to the defendant's sentence for aggravated assault resulting in serious bodily injury and involuntary manslaughter where the defendant had caused an automobile accident while he was intoxicated. The circuit court reasoned that an upward adjustment under USSG §2A2.2(b)(2)(B) is authorized only when a defendant used an instrument capable of causing serious bodily injury with the intent to injure his victim. The circuit court concluded the defendant's conduct was reckless, but not intentional, and thus he did not "use" a dangerous weapon within the meaning of the guidelines.

§2A6.1 Threatening Communications

United States v. Hines, 26 F.3d 1469 (9th Cir. 1994). The district court did not err in enhancing the defendant's sentence for engaging in conduct evidencing an intent to carry out a threat pursuant to USSG §2A6.1(b)(1). The defendant pleaded guilty to threatening the President, in violation of 18 U.S.C. § 871 and to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He argued the enhancement was not applicable because the conduct on which the adjustment was based occurred prior to the threatening communication. In support of his argument, he cited the Second Circuit's decision in United States v. Hornick, 942 F.2d 105 (2d Cir. 1991), *cert. denied*, 502 U.S. 1061 (1992), wherein that court considered the future conditional tense of the commentary to §2A6.1 as evidence of the Commission's intent that the conduct occur contemporaneously with or after the threat. *Id*. at 108. The circuit court

rejected the Hornick analysis as placing too much emphasis on the commentary's use of the future conditional tense instead of on the purpose of the enhancement. Thus, the circuit court concluded that the issue should not be one of timing but rather "whether the conduct shows the defendant's intent and likelihood to carry out the threats." Here, the defendant's theft of a firearm and his trip to Washington, D.C., was conduct which evidenced his intent to carry out his threats.

Part B Offenses Involving Property

§2B1.1 Larceny, Embezzlement, and Other Forms of Theft

See United States v. Lam, 20 F.3d 999 (9th Cir. 1994), p. 1.

United States v. Yellowe, 24 F.3d 1110 (9th Cir. 1994). The district court did not err in applying USSG §2B1.1 to the unauthorized use of credit card numbers. The defendant pleaded guilty to the use of unauthorized access devices to obtain goods and services in violation of 18 U.S.C. § 1029. He argued that Application Note 4 in §2B1.1 should only apply to loss caused by the unauthorized use of the credit card, not to the use of the number. The circuit court concluded that there was nothing in the guidelines which suggested such a distinction should be made since loss is caused in precisely the same manner.

United States v. Zuniga, 66 F.3d 225 (9th Cir. 1995). The district court did not err by enhancing the defendant's sentence pursuant to USSG §2B1.1(b)(5) for being a person in the business of receiving and selling stolen property. The defendant pleaded guilty to conspiracy to possess stolen goods from an interstate shipment and was sentenced to 30 months imprisonment. On appeal, the defendant challenged the district court's application of the enhancement and argued that the circuit court should join the Fifth, Sixth, and Seventh Circuits in adopting the "fence" test to determine whether the defendant was "in the business." *See* United States v. Warshawsky, 20 F.3d 204, 214 (6th Cir. 1994); United States v. Esquivel, 919 F.3d 957, 959 (5th Cir. 1990); United States v. Braslawsky, 913 F.2d 466, 468 (7th Cir. 1990) (enhancement does not apply to a defendant who sells property that he himself has stolen). Under the "fence" test, the government must show that the defendant is a person who buys and sells stolen property and, thereby, encourages others to commit property crimes. The circuit court instead joined the First and Third Circuits in adopting the "totality of the circumstances" test. *See* United States v. King, 21 F.3d 1302, 1306 (3d Cir. 1994); United States v. St. Cyr, 977 F.2d 698, 703 (1st Cir. 1992). Under the "totality of the circumstances" test, the sentencing judge undertakes a case-by-case approach with the emphasis on the "regularity and sophistication of a defendant's operation." St. Cyr, 977 F.2d at 703. The circuit court ruled that based on the regularity and sophistication of the defendant's operation, the district court reasonably concluded that the defendant was warehousing and selling merchandise stolen by others, *i.e.*, fencing property, in addition to property he had stolen. The circuit court held that the district court's factual conclusions were not clearly erroneous, and the application of the enhancement pursuant to USSG §2B1.1(b)(1)(5) was correct.

§2B3.1 Robbery

United States v. Burnett, 16 F.3d 358 (9th Cir. 1994). The district court enhanced the defendant's base offense level by 5 levels, pursuant to USSG §2B3.1(b)(2)(C), because he displayed a starter gun during the bank robbery. The circuit court vacated the defendant's sentence and remanded for the district court to determine whether the starter gun should be treated as a firearm under USSG §2B1.3(b)(2)(C) (5-level increase) or as a dangerous weapon under §2B3.1(b)(2)(E) (3-level increase). "Although the Guidelines treat items that appear to be dangerous weapons as dangerous weapons, the Guidelines do not treat items that only appear to be firearms as firearms." The government failed to meet its burden of proving, by a preponderance of the evidence, that the starter gun actually fit the definition of a firearm at USSG §1B1.1, comment. (n.1(e)). In order for the 5-level firearm enhancement to apply, the government must prove that the starter gun "will or is designed to or may readily be converted to expel a projectile by action of an explosion." USSG §1B1.1, comment. (n.1(e)).

United States v. Duran, 4 F.3d 800 (9th Cir. 1993), *cert. denied*, 510 U.S. 1078 (1994). The defendant was convicted of robbery and use of a firearm in the commission of a robbery. Sentencing for robbery is governed by §2B3.1, and sentencing for the use of a firearm in violation of 18 U.S.C. § 924(c) is governed by §2K2.4. The district court erred by increasing the defendant's bank robbery offense level for an express threat of death under §2B3.1(b)(2)(F). Application Note 2 to §2K2.4 states, "where a sentence under this section is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use or discharge of a firearm (*e.g.*, §2B3.1(b)(2)(A)-(F) (Robbery)), is not to be applied in respect to the guideline for the underlying offense." The circuit court held that the enhancement under USSG §2B3.1(b)(2)(F) for an express threat of death should not be applied where the defendant is convicted of the violation of 18 U.S.C. § 924(c).

United States v. France, 57 F.3d 865 (9th Cir. 1995). The appellate court upheld the district court's determination that the defendant's statement during a bank robbery that he had dynamite was an "express threat of death" for purposes of USSG §2B3.1(b)(2)(F). The appellate court looked to examples cited in the guidelines commentary, and found that the mention of dynamite met the guideline criteria that the offender "engaged in conduct that would instill in a reasonable person, who is the victim of the offense, significantly greater fear than that necessary to constitute an element of the offense of robbery." The appellate court rejected the Eleventh Circuit's decision in United States v. Tuck, 964 F.2d 1079 (11th Cir. 1993), which held that the threat "don't do anything funny or I'll be back" failed to qualify because it was not sufficiently "direct, distinct, or express." The appellate court noted that the Tuck opinion was written before the United States Supreme Court in Stinson v. United States, 113 S. Ct. 1913, 1915 (1993) made it clear that the guidelines commentary is authoritative. The appellate court joined the Seventh, Eighth, and Tenth Circuits in holding that an "express threat of death" does not require an explicit threat to kill the victim. *See* United States v. Hunn, 24 F.3d 994, 996-98 (7th Cir. 1994); United States v. Bell, 12 F.3d 139, 140 (8th Cir. 1992); United States v. Lambert, 995 F.2d 1006, 1008 (10th Cir.), *cert. denied*, 510 U.S. 926 (1993). **Note**: §2B3.1 was amended on this issue effective November 1, 1997 (amendment 552).

United States v. Napier, 21 F.3d 354 (9th Cir. 1994). The district court correctly interpreted "loss" under USSG §2B3.1(b)(6). The defendant, convicted of bank robbery, 18 U.S.C. § 2113(a),(d), argued that no loss occurred because government agents recovered the

money shortly after the offense was committed. The Ninth Circuit disagreed. The commentary to USSG §2B3.1 refers to the commentary to USSG §2B1.1 for determining the valuation of loss. Since "`loss' means the value of property taken, damaged or destroyed," USSG §2B1.1, comment. (n.2), the court properly calculated the amount of loss based on the amount of money stolen from the bank.

Part D Offenses Involving Drugs

§2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

See United States v. Cruz-Medoza, 147 F.3d 1069 (9th Cir. 1998), §1B1.3, p. 2.

United States v. McLain, 133 F.3d 1191 (9th Cir.), *cert. denied,* 118 S. Ct. 2386 (1998). The district court properly resentenced the defendant after his 924(c) conviction was vacated following the Supreme Court's opinion in Bailey. As a matter of first impression, the Ninth Circuit held that resentencing under this circumstances did not constitute double jeopardy despite the fact that the defendant had already completed that portion of the sentence connected to the underlying drug offense. The Ninth Circuit noted that following a successful section 2255 petition to vacate a section 924(c) conviction and sentence, a district court has the authority to resentence a defendant in order to correct the defendant's sentence related to the underlying offense, to reflect the possession of a weapon. Additionally, double jeopardy prohibits an increase in a defendant's sentence where there is a legitimate expectation of finality attached to the sentence. Double jeopardy is not violated when a defendant is resentenced after his section 924(c) conviction is vacated. *See* United States v. Handa, 122 F.3d 690, 692 (9th Cir. 1997).

United States v. Parrilla, 114 F.3d 124 (9th Cir. 1997). The defendant pleaded guilty to two counts of cocaine distribution. On appeal, the defendant argued that district court erred in making no specific factual findings regarding the defendant's claim that he was entrapped into trading cocaine for firearms. The Ninth Circuit agreed, vacating the sentence and remanded for further proceedings. The appellate court noted that the gun enhancement is not applicable when the defendant is able to prove sentencing entrapment by a preponderance of the evidence. The government argued that the district court properly considered and rejected the defendant's evidence. The Ninth Circuit disagreed, noting that nothing in the record showed that the district court considered all the relevant evidence or made the required findings to reject such an argument.

United States v. Pinto, 48 F.3d 384 (9th Cir.), *cert. denied*, 516 U.S. 841 (1995). The district court did not err in denying the defendants a downward departure under §2D1.1, Application Note 16, based on its finding that the defendants' culpability was not "overrepresented." Application Note 16 allows a downward departure where (A) the amount of the controlled substance for which the defendant is accountable under USSG §1B1.3 (Relevant Conduct) results in a base offense level greater than 36, (B) the court finds that this offense level overrepresents the defendant's culpability in the criminal activity, and (C) the defendant qualifies for a mitigating role adjustment under USSG §3B1.2 (Mitigating Role). The defendants argued that overrepresentation of culpability is determined solely by whether the defendant qualifies for a

mitigating role adjustment under USSG §3B1.2. Conversely, the government argued that overrepresentation for purposes of clause (B) is determined by considering the base offense level set by USSG §1B1.3. The circuit court agreed with the government's position, ruling that overrepresentation is determined by the defendant's "accountability" under USSG §1B1.3 and whether this "accountability" is commensurate with the defendant's involvement in the crime. In this case, the district court correctly based its evaluation of culpability on the amounts of controlled substance with which the defendants were involved, and simply determined that the base offense level accurately reflected this culpability. Because the district court's analysis of Application Note 16 was proper, its discretionary denial of a downward departure was unreviewable.

United States v. Roth, 32 F.3d 437 (9th Cir. 1994). In addressing an issue of first impression in the Ninth Circuit, the appellate court held that the district court did not err in holding that it was precluded from departing downward to a sentence of probation where the defendant was entitled to a downward departure for substantial assistance under 18 U.S.C. § 3553(e), but was subject to a mandatory minimum prison sentence under 21 U.S.C. § 841(b)(1)(A). The circuit court, following the Sixth and Seventh Circuits, held that while section 3553(e) allowed the district court to disregard the minimum sentence otherwise imposed by statute, it did not authorize the court to disregard the statutory ban on probation contained in 21 U.S.C. § 841(b)(1)(A). Rather, the circuit court concluded, the probation ban in section 841(b)(1)(A) was designed to limit the discretion granted sentencing courts to depart below a mandatory minimum under 18 U.S.C. § 3553(e) by eliminating probation without imprisonment as a sentencing option.

United States v. Scrivner, 114 F.3d 964 (9th Cir. 1997). The district court did not commit plain error when it sentenced a defendant under the sentencing formula for D-methamphetamine, rather than L-methamphetamine, when the government failed to present evidence as to which category of the drug was involved. As a matter of first impression, the Ninth Circuit held that the defendants, who were convicted of various methamphetamine offenses, failed to object during trial or sentencing about the type of drugs involved in their case, and therefore, it was not plain err for the trial court to sentence based on the more common form of D-methamphetamine. The appellate court noted that there is a circuit split regarding whether such a sentence would constitute plain error. The Eighth and Tenth Circuits have held that a district court does not commit plain error in the circumstance of this case. *See* United States v. Griggs, 71 F. 3d 276, 282 (8th Cir. 1995); United States v. Deninno, 29 F.3d 572, 580 (10th Cir.), *cert. denied*, 513 U.S. 1158 (1995). Conversely, the Third and Eleventh Circuits have held that it is plain error to sentence defendants for a drug crime involving D-methamphetamine when the government fails to introduce any evidence as to the type of methamphetamine involved. *See* United States v. Bogusz, 43 F.3d 82, 90 (3d. Cir.), *cert. denied*, 514 U.S. 1090 (1995); United States v. Ramsdale, 61 F.3d 825, 832 (11th Cir. 1995). The Ninth Circuit concluded that, although a defendant's sentence varies significantly depending on which variety of methamphetamine is involved, the defendants did not challenge the district court at anytime prior to their appeal. Only when a defendant seeks to challenge the factual accuracy of a matter contained in the presentence report must the district court at the time of sentencing make findings or determinations as required by Rule 32.

Part F Offenses Involving Fraud or Deceit

§2F1.1 Fraud and Deceit

See United States v. Kemmish, 120 F.3d 937 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1087 (1998), §2G2.2, p. 11.

United States v. Mende, 43 F.3d 1298 (9th Cir. 1995). The district court did not err in calculating the amount of loss pursuant to USSG §2F1.1, when it included $13,000,000 incurred by banks when the defendant's company failed to honor its loan guarantees. The defendant, along with co-conspirators, operated a complex loan fee fraud scheme where advance fees for nonexistent loans and loan guarantees were solicited. The defendant challenged the district court's inclusion of the $13,000,000 as actual loss, claiming the amount should have been considered incidental and consequential damages. The appellate court held the $13,000,000 was a direct result of the defendant's fraudulent misrepresentations and was therefore properly included in the calculation of the amount of loss.

United States v. Robinson, 94 F.3d 1325 (9th Cir. 1996). The court did not err in increasing the defendants' base offense level for the amount of loss in connection with the offense of manufacturing and selling counterfeit credit cards. The court rejected the defendants' argument that the enhancement for amount of loss should not be applied because the credit cards were sold to undercover government agents which eliminated the possibility of loss to a victim. Instead, the court adhered to USSG §2F1.1 Application Note 7 which states that if there is no actual loss, the sentencing court should calculate the loss the defendant intended to inflict. This approach is consistent with Ninth Circuit precedent which holds that if a sentencing judge chooses to calculate intended loss, there is no requirement that the court consider the realistic probability of loss that would result from the execution of the defendant's plan. The court rejected the defendant's additional argument that the calculation of the amount of loss should be analogized to the drug offense penalties under USSG §2D1.1, whereby a defendant may not be sentenced for drug amounts which he did not intend to provide or was not capable of providing. Without reaching the issue of whether the drug guidelines may be applied to counterfeit cases, the court noted the defendant was fully capable of manufacturing and selling all 2,000 credit cards. In short, the court found there is no requirement that the amount of loss calculated for purposes of enhancement be realistically probable.

Vargas v. United States, 67 F.3d 823 (9th Cir. 1995). The district court did not err in departing upward because the base offense level failed to adequately reflect the defendant's culpability and because of the extraordinary amount of loss caused by the defendant's fraudulent scheme. The defendant pleaded guilty to two counts of securities fraud and one count of submitting a false loan application to a federally insured institution and was sentenced pursuant to the 1987 guidelines to prevent ex post facto concerns. The district court calculated the loss to be at least $20 million and departed upward using a linear approach, which was 1 level for each $5 million increase in loss. The issue on appeal was whether the linear approach was proper or "whether the district court was required to extrapolate from the loss table and follow its rough exponential program." The circuit court held that the district court's approach was reasonable. The circuit court noted that the loss table in the 1987 version of the guidelines for USSG §2F1.1

ends at $5 million and the guideline provides for departures "if the loss substantially exceeds that amount." The court further noted that had the Commission intended the district court to follow the pattern provided in the loss table in cases of extraordinary loss, the Commission would have provided for it in the guideline. The circuit court ruled that the district court's approach was consistent with the basic structure of the guideline and reflects the fundamental policy of USSG §2F1.1 "to impose greater punishment on those who cause greater social harm."

Part G Offenses Involving Prostitution, Sexual Exploitation of Minors, and Obscenity

§2G2.2 Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving, Transporting, Shipping, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic

United States v. Kemmish, 120 F.3d 937 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1087 (1998). The defendant pleaded guilty to failing to report transportation of currency, making a false statement, and various child pornography offenses. In a cross-appeal, the government argued that the district court erred by failing to enhance the defendant's sentence because his conduct as a major distributor of child pornography amounted to a pattern of sexual exploitation of minor. In a case of first impression, the Ninth Circuit concluded that the defendant's extensive activities as a trafficker in child pornography did not constitute a patten of sexual exploitation of minors. The appellate court reasoned that a "pattern of activity" for the purposes of §2G2.2(b)(4) means a combination of two or more separate instances of sexual abuse or sexual exploitation involving the same or different victims. The few reported decisions involving 18 U.S.C. § 2251(c) and §2G2.2(b)(4) have unanimously interpreted sexual exploitation of a minor as being inapplicable to traffickers in child pornography who are not directly involved in the sexual abuse. *See* United States v. Chapman, 60 F.3d 894, 898 (1st Cir. 1995); United States v. Barton, 76 F.3d 499, 503 (2d Cir. 1996); United States v. Ketcham, 80 F.3d 789, 794 (3d Cir. 1996). Section 2G2.1 sets out the various forms of exploitation of a minor which are prohibited. No guideline refers to the possession of transporting, trafficking, or reproducing child pornography as "sexual abuse" or "exploitation of a minor." Therefore, the Ninth Circuit concluded that the 5-level sentence enhancement did not apply in this case. **Note**: §2G2.2 was amended on this issue effective November 1, 1997 (amendment 537).

Part J Offenses Involving the Administration of Justice

§2J1.6 Failure to Appear by Defendant

See United States v. Gray, 31 F.3d 1443 (9th Cir. 1994), p. 26.

Part K Offenses Involving Public Safety

§2K2.1 Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition

See United States v. Mun, 41 F.3d 409 (9th Cir. 1994), *cert. denied*, 514 U.S. 1077 (1995), p. 2.

United States v. Routon, 25 F.3d 815 (9th Cir. 1994). The district court did not err in finding that the defendant possessed a firearm "in connection with" the felony for which he was convicted pursuant to guideline §2K2.1(b)(5). The circuit court agreed with the Tenth Circuit's approach in United States v. Gomez-Arrellano, 5 F.3d 464 (10th Cir. 1993), which found 18 U.S.C. § 924(c)'s phrase "in relation to" to be an appropriate guide in determining the meaning of USSG §2K2.1(b)(5)'s phrase "in connection with" because there is no difference "in the common understandings" between the two phrases. Therefore, the government must prove a firearm was possessed in a "manner that permits an inference that it facilitated or potentially facilitated . . . the defendant's felonious conduct." This court declined to follow the Fifth Circuit's holding in United States v. Condren, 18 F.3d 1190 (5th Cir.), *cert. denied*, 513 U.S. 856 (1994), which held that section 924(c) should not be used as a guide in interpreting guideline §2K2.1(b)(5), but rather looked to guideline §2D1.1(b)(1) for an analogy.

Part L Offenses Involving Immigration, Naturalization, and Passports

§2L1.2 Unlawfully Entering or Remaining in the United States

United States v. Gonzalez-Mendez, 150 F.3d 1058 (9th Cir. 1998). The district court did not err in increasing the defendant's base offense level by 16 levels based on his having been deported following a conviction for an aggravated felony. The defendant argued that Application Note 7 to USSG §2L1.2 (1996) limits the offenses for which the enhancement may be applied to those for which the term of imprisonment was completed within the previous 15 years. The court of appeals rejected this argument, holding that the application note intends the explicit 15-year limit to refer only to convictions under foreign law. Therefore, the domestic crimes for which the defendant's term of imprisonment was completed more than 15 years prior to sentencing do trigger the 16-level enhancement. **Note**: §2L1.2 has subsequently been amended to incorporate by reference the statutory definition (8 U.S.C. § 1101(a)(43)) of “aggravated felony.”

United States v. Lomas, 30 F.3d 1191 (9th Cir. 1994), *cert. denied*, 513 U.S. 1176 (1995). The district court did not err in enhancing the defendant's offense level because he was previously deported after a conviction for an aggravated felony. USSG §2L1.2(b). The defendant argued that his prior state conviction for transportation of small amounts of cocaine for personal use was not an aggravated felony, and that mere transportation was not within the

statutory definition of "illicit trafficking." The circuit court disagreed. "Trafficking" means not only trading or dealing in narcotics but also movement of narcotics. To exclude the movement or transportation of drugs from the definition of "illicit trafficking" would be contrary to congressional intent.

Part T Offenses Involving Taxation

§2T1.1 Tax Evasion

United States v. Kienenberger, 13 F.3d 1354 (9th Cir. 1994). The district court erred when it failed to consider preguidelines conduct in determining the defendant's tax loss under USSG §2T1.1. The government argued that the inclusion of the defendant's preguideline tax evasion did not violate the ex post facto clause because it is part of a "continuing pattern of violations of the tax laws by the defendant," USSG §2T1.1, comment. (n.2) which is presumed to be "part of the same course of conduct" for purposes of §1B1.3(a)(2). The Ninth Circuit agreed and joined several other circuits in so holding. *See* United States v. Regan, 989 F.2d 44 (1st Cir. 1993); United States v. Haddock, 956 F.2d 1534 (10th Cir.), *cert. denied*, 506 U.S. 828 (1992); United States v. Cusack, 901 F.2d 29 (4th Cir. 1990); United States v. Ykema, 887 F.2d 697 (6th Cir. 1989), *cert. denied*, 493 U.S. 1062 (1990); United States v. Allen, 886 F.2d 143 (8th Cir. 1989).

United States v. Valentino, 19 F.3d 463 (9th Cir. 1994). The district court did not err in disallowing an evidentiary hearing to determine whether defendant's willful underreporting of interest income on his income tax returns resulted in a tax loss. The defendant claimed that, in addition to understating his interest income, he also understated depreciation deductions to which he was entitled. He argued that no additional tax would have been due had he disclosed the hidden income but also claimed the missed deductions. The circuit court agreed with the district court's finding that, as a matter of law, it did not matter whether the defendant was entitled to the depreciation deductions, or how much the government lost in taxes. Rather, the purpose of the tax fraud guideline is to "measure the size of the lie, not the size of the government's loss . . . ." Here, the defendant had used false social security numbers and names to hide almost $100,000 of interest income. **Note**: §2T1.1 was amended on this issue effective November 1, 1997 (amendment 491).

Part X Other Offenses

§2X5.1 Other Offenses

United States v. VanKrieken, 39 F.3d 227 (9th Cir. 1994), *cert. denied*, 514 U.S. 1075 (1995). The defendant asserted that the district court applied the incorrect guideline in sentencing him upon his conviction for corrupt interference with the administration of tax laws, in violation of 26 U.S.C. § 7212(a). The district court sentenced the defendant using USSG §2J1.2(a), Obstruction of Justice, as opposed to USSG §2T1.5, Fraudulent Returns, Statements, or Other Documents. Under USSG §1B1.2, the commentary provides that the court will "determine which guideline section applies based upon the nature of the offense charged in the count of which the defendant was convicted," when the "particular statute proscribes a variety of conduct that might

constitute the subject of different offense guidelines." In this case, the district court correctly followed the method set forth in USSG §2X1.5, which instructs the court to determine the most analogous guideline. The district court properly analogized the defendant's conduct in filing false tax returns and seeking a tax levy on innocent tax payers, among other conduct, to obstruction of justice.

CHAPTER THREE: *Adjustments*

Part A Victim-Related Adjustments

§3A1.1 Vulnerable Victim

United States v. Fontenot, 14 F.3d 1364 (9th Cir.), *cert. denied*, 513 U.S. 966 (1994). The district court erred in applying a 2-level upward adjustment because of either an abuse of a position of trust pursuant to USSG §3B1.3 or vulnerable victim pursuant to USSG §3A1.1, posed in the alternative, in sentencing a defendant convicted of traveling in interstate commerce to contract the murder-for-hire of his wife. The Ninth Circuit found that the defendant's spousal relationship did not create a position of trust that significantly facilitated the commission or concealment of the offense to justify enhancement under USSG §3B1.3. The Ninth Circuit likewise found defendant's status as the intended victim's spouse did not justify enhancement under USSG §3A1.1 because the spousal relationship did not make her any more vulnerable than any other intended victim of a murder-for-hire.

United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). The defendant perpetrated a hoax on the family of a missing 8-year-old girl by claiming that he knew the identity of her assailant and the whereabouts of her body. The defendant was convicted of obstructing an FBI investigation, making false statements to the FBI, and obstructing justice by giving false testimony to the grand jury. He appealed the district court's upward adjustment of his sentence under the Vulnerable Victim provision of USSG §3A1.1. He asserted that the child's family was not a victim of his offenses, because his false statements and obstruction were made to the government. The appellate court affirmed the district court's determination that the family was also a victim, and held that "courts properly may look beyond the four corners of the charge to the defendant's underlying conduct in determining whether someone is a "vulnerable victim" under section 3A1.1." The court joined the majority of the circuit courts that have addressed this issue. *See, e.g.*, United States v. Echevarria, 33 F.3d 175, 180-81 (2d Cir. 1994)(vulnerable victim need not be victim of the offense of conviction); United States v. Lee, 973 F.2d 832, 833-34 (10th Cir. 1992) (same); United States v. Yount, 960 F.2d 955, 957-58 (11th Cir. 1992) (same); United States v. Bachynsky, 949 F.2d 722, 735 (5th Cir. 1991) (same), *cert. denied*, 506 U.S. 850 (1992); United States v. Callaway, 943 F.2d 29, 31 (8th Cir. 1991) (dictum); *but see* United States v. Wright, 12 F.3d 70, 73 (6th Cir. 1993) (vulnerable victim must be victim of defendant's offense of conviction).

United States v. O'Brien, 50 F.3d 751 (9th Cir. 1995). The appellate court rejected the First Circuit's interpretation of USSG §3A1.1 in United States v. Rowe, 999 F.2d 14 (1st Cir. 1993), which held that the commentary requires that a defendant "target" vulnerable victims

before the enhancement applies. While noting that the circuits have split on this issue, the court chose to follow its prior holding in United States v. Boise, 916 F.2d 497, 506 (9th Cir. 1990), *cert. denied*, 500 U.S. 934 (1991), which "specifically rejected the argument that §3A1.1 requires a defendant to select a victim intentionally because of his vulnerability." The court noted that it reconciled the commentary to guideline §3A1.1 with the text of the guideline in its opinion in United States v. Caterino, 957 F.2d 681, 683 (9th Cir.), *cert. denied*, 506 U.S. 843 (1992), wherein it held that the "commentary's language has a limited purpose—`to exclude those cases where defendants do not know they are dealing with a vulnerable person.'" In this case, the defendants "knew or should have known" that many claimants in their medical insurance scam were vulnerable because they had medical conditions which realistically precluded them from switching insurance companies, and they continued to accept these claimants' premium payments. The appellate court also rejected the defendants' assertion that the victims were not "unusually vulnerable" or "particularly susceptible" to the fraud. "Here, victims who developed medical conditions and could not get their claims paid are, as a group, unusually vulnerable to appellants' continued acceptance of premiums and appellants' promises of payment." The enhancement was affirmed.

Part B Role in the Offense

§3B1.2 Mitigating Role

United States v. Demers, 13 F.3d 1381 (9th Cir. 1994). The district court erred in holding that a defendant was not entitled to an adjustment for mitigating role pursuant to USSG §3B1.2 as a matter of law based on the fact that the defendant was convicted of the single participant offense of possession with intent to distribute instead of the conspiracy with which he was originally charged. The Ninth Circuit held that, pursuant to a clarifying amendment to the introductory commentary to Chapter Three of the Guidelines Manual, the determination of a defendant's role in the offense is to be made on the basis of all relevant conduct, and is not limited to the defendant's role in the offense of conviction. The circuit court remanded the case to the district court for a factual determination as to the relative seriousness of the offense to which the defendant pleaded guilty compared to his actual criminal conduct.

See United States v. Ullyses-Salazar, 28 F.3d 932 (9th Cir. 1994), *cert. denied*, 514 U.S. 1020 (1995), p. 34.

§3B1.3 Abuse of Position of Trust or Use of Special Skill

See United States v. Fontenot, 14 F.3d 1364 (9th Cir.), *cert. denied*, 514 U.S. 966 (1994), §3A1.1, p. 14.

United States v. Harper, 33 F.3d 1143 (9th Cir. 1994), *cert. denied*, 513 U.S. 1118 (1995). The district court erred in determining that the knowledge the defendant gained about automated teller machines (ATM's) as an employee at an ATM service company and then as an employee of the bank she attempted to rob qualified as a special skill, where the defendant purposely caused an ATM to malfunction so that she could attempt to rob the ATM technicians when they opened the ATM to perform repairs. The circuit court ruled that the defendant's

special knowledge of ATM machines and their service procedures did not involve the kind of education, training or licensing required to constitute a special skill under USSG §3B1.3, comment. (n.2). *But see* United States v. Aubin, 961 F.2d 980 (1st Cir.), *cert. denied*, 113 S. Ct. 248 (1992).

Part C Obstruction

§3C1.1 Willfully Obstructing or Impeding Proceedings

United States v. Fontenot, 14 F.3d 1364 (9th Cir.), *cert. denied*, 513 U.S. 966 (1994). The district court did not err in applying a 2-level upward adjustment for obstruction of justice pursuant to USSG §3C1.1 because the defendant refused to submit to psychiatric testing. The Ninth Circuit found this refusal to be material because the defendant asserted the defense of diminished capacity.

United States v. Khang, 36 F.3d 77 (9th Cir. 1994). The district court permitted the defendants to bring forth evidence proving their assertion that they brought opium into the United States for their sick father, which is in accordance with their Hmong culture. When the defendants failed to adequately prove their assertion, however the court properly enhanced their sentence pursuant to §3C1.1, Obstruction of Justice. The obstruction was material, because it was made in an attempt to receive a downward departure. The government argued that the defendants did not merit the district court's award of a downward adjustment for acceptance of responsibility under §3E1.1 because the defendants lied about relevant conduct, *i.e.*, their motive for committing the crime. The court held that lying about motive does not preclude a downward adjustment for acceptance of responsibility where "the lie would not establish a defense to the crime or avoid criminal liability." However, the district court did err in assigning one of the defendants an additional 1-level downward adjustment under USSG §3E1.1 for timely acceptance of responsibility where he did not plead guilty until the evening before trial. The trial court's rationale for granting the additional level was to achieve equality between the two defendants' sentences. The brothers were "not equal in the timeliness of their acceptance of responsibility." Thus, the trial court lacked authority to grant that adjustment.

§3C1.2 Reckless Endangerment During Flight

United States v. Luna, 21 F.3d 874 (9th Cir. 1994). The district court properly adjusted by 2 levels defendant Torres' offense level for reckless endangerment. While fleeing the scene of an armed bank robbery, the defendants ran three stop signs, stopped the car in the middle of the road and when they were approached by a police officer, defendant Luna reached down to the floorboards (where a gun was later recovered); after the police officer retreated, the defendants accelerated, forcing the police officer to make chase, after which the defendants jumped out of the vehicle while it was still moving. Torres argued that the traffic violations did not amount to reckless endangerment and that Luna's movement towards the gun was merely preparatory and could not form the basis of a §3C1.2 enhancement. The circuit court concluded that the traffic violations did constitute a gross deviation from ordinary care because the conduct occurred in a residential area and created a substantial risk of serious bodily injury or death. However, the circuit court left for another day the question of whether preparatory conduct to avoid arrest

could constitute reckless endangerment, although it noted the First Circuit's dictum in United States v. Bell, 953 F.2d 6 (1st Cir. 1992) that reaching for a gun could form the basis of a guideline §3C1.2 enhancement.

Part D Multiple Counts

§3D1.2 Groups of Closely-Related Counts

United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994), *cert. denied*, 513 U.S. 1132 (1995). Guideline §3D1.2(a) states that multiple counts are grouped together when they "involve the same victim and the same act or transaction." The defendant was convicted of felony murder and aggravated sexual abuse; the district court did not group the two offenses and the defendant received two concurrent life sentences. These two offenses constituted a single act, at essentially the same time, same place, against the same victim and with a single criminal purpose. Accordingly, the sentencing judge erred by not grouping these two offenses together pursuant to guideline §3D1.2. Contrary to the government's argument that "even if §3D1.2 was applicable, the district court established the basis for imposition of concurrent life sentences as an upward departure by commenting on the defendant's recidivism and psychopathic tendencies;" the circuit court found no indication in the record that the district court intended to depart upward in this manner. Consequently, the circuit court reversed the sentencing judge's failure to correctly group the two offenses and remanded the case.

United States v. Hines, 26 F.3d 1469 (9th Cir. 1994). The district court did not err when it determined that the defendant's two convictions were not "closely related" for grouping purposes. USSG §3D1.2. The defendant pleaded guilty to threatening the President, in violation of 18 U.S.C. § 871 and to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). He argued that the possession was a "count embodied" in a specific offense characteristic used to enhance his base offense level because the district court relied on his possession of the firearm to increase his sentence for conduct evidencing an intent to carry out the threat under §2A6.1. USSG §3D1.2. Although the circuit court found that the district court relied on the possession of the weapon to apply the §2A6.1(b)(1) enhancement, it held that the counts were not groupable. "[T]he conduct embodied in being a felon in possession of a firearm is not substantially identical to the specific offense characteristic of engaging in conduct evidencing an intent to carry out a threat against the President [since] [c]onduct evidencing an intent to carry out a threat may be manifested in many different ways."

See United States v. Rose, 20 F.3d 367 (9th Cir. 1994), §1B1.3, p. 2.

Part E Acceptance of Responsibility

§3E1.1 Acceptance of Responsibility

United States v. Colussi, 22 F.3d 218 (9th Cir. 1994). The district court incorrectly believed application of USSG §3E1.1(b)(2) was discretionary. The defendant entered a plea agreement whereby the government agreed to recommend the 2-level adjustment for acceptance of responsibility then applicable. The defendant's sentencing was continued several months, during which time the Commission amended USSG to provide an additional 1-level adjustment where the defendant accepted responsibility, was at offense level 16 or above, and (1) assisted authorities by providing complete information about his involvement in the offense, or (2) timely notified authorities of his intent to plead guilty. The district court judge refused to grant the additional reduction, indicating that he believed the denial was within his discretion, and that the adjustment was unwarranted since the defendant had stipulated only to the 2-level reduction. The Ninth Circuit vacated the defendant's sentence. Unlike departures, adjustments are "characteristically mandatory." The district court was ordered on remand to consider whether the defendant provided authorities with "sufficiently advance notice of his intent to plead guilty" to enable the Government to avoid trial preparation and to allow the court to schedule its calendar efficiently, which would merit the additional 1-level decrease.

See United States v. Khang, 36 F.3d 77 (9th Cir. 1994), §3C1.1, p. 16.

United States v. Kimple, 27 F.3d 1409 (9th Cir. 1994). In addressing an issue of first impression, the circuit court determined what constitutes "timely" acceptance of responsibility, reversing the district court's denial of an additional reduction for timely acceptance of responsibility pursuant to USSG §3E1.1(b)(2). The district court denied the defendant the additional reduction based on the passage of one year's time before he pleaded guilty and his motion to suppress evidence. The circuit court explained that the time requirement in subsection (b)(2) is both functional and temporal and is context specific; thus passage of time is not the only consideration in determining whether the grant the additional reduction. Although the defendant did not enter his plea until a year after he was originally indicted, the plea came only five months after the government filed its second superseding indictment. The parties and the district court contributed to the delay by seeking and granting continuances. More importantly, however, the district court was wrong to deny the reduction because the defendant exercised his constitutional rights at the pretrial stage of the proceedings. The motion to suppress was not frivolous and the government's opposition to the motion did not constitute "trial preparation" within the meaning of subsection (b)(2). The sentence was vacated and remanded for resentencing.

United States v. McKinney, 15 F.3d 849 (9th Cir. 1994), *cert. denied*, 516 U.S. 857 (1995). The district court erred in denying the defendant an adjustment for acceptance of responsibility. Prior to trial, the defendant attempted to plead guilty and when he expressed confusion concerning his plea, the court declined to discuss the matter. At trial, the defendant presented the most perfunctory of defenses and did not even produce a witness to contest a material part of the government's case. Further, the defendant voluntarily confessed his involvement in the offense and disclosed the location of the gun used during the commission of the offense. The circuit court concluded that these factors presented one of the unusual cases in

which a defendant is entitled to the reduction despite going to trial, and rejected the notion that the defendant was not entitled to the adjustment because he refused to implicate his co-conspirators. Acceptance of responsibility focuses on the defendant's contrition for his own conduct, not on the conduct of others. The circuit court remanded with instructions to resentence the defendant pursuant to the current version of the guidelines in effect at resentencing and with instructions to consider application of §3E1.1(b).

United States v. Rutledge, 28 F.3d 998 (9th Cir. 1994), *cert. denied,* 516 U.S. 1177 (1995). The district court did not err by denying the defendant a reduction for acceptance of responsibility. The defendant pleaded guilty to, and fully admitted to, being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1); however, he denied that he possessed the weapon during the commission of an attempted robbery. He challenged the district court's refusal of the §3E1.1 adjustment on fifth amendment grounds. The circuit court rejected this argument and distinguished the defendant's case from other cases which have decided this issue. *See* United States v. Perez-Franco, 873 F.2d 455 (1st Cir. 1989)(acceptance of responsibility cannot be conditioned upon the defendant's admitting to all conduct alleged in the indictment, including dismissed counts); United States v. Oliveras, 905 F.2d 623 (2d Cir. 1990)(defendant cannot be forced to choose between acceptance of responsibility and his fifth amendment rights). Unlike Perez-Franco and Oliveras, the defendant was not required to admit to any conduct outside the offense of conviction. "He was entitled to remain silent about any relevant, uncharged conduct. Once he chose to relinquish that right, however, he was required to be truthful in order to qualify for the reduction."

United States v. Sanchez Anaya, 143 F.3d 480 (9th Cir. 1998). The district court properly deducted levels for role in the offense prior to determining whether the defendant qualified for additional offense level reduction for acceptance of responsibility. After the adjustment for minor role, the defendant's offense level was 14, which meant that he was entitled to no more than 2 levels for acceptance of responsibility. The guidelines instruct that the role points should be deducted before turning to the provision for acceptance of responsibility.

United States v. Stoops, 25 F.3d 820 (9th Cir. 1994). The district court erred in denying the defendant an additional 1-level reduction under USSG §3E1.1(b), when the defendant confessed to the crime three times on the day it was committed. The court rejected the government's argument that a confession must assist the authorities in the prosection of the defendant in order to warrant a 1-level reduction under USSG §3E1.1(b). Although the defendant challenged the admissibility of his confessions in a pretrial motion, the motion did not delay his confession and did not bear on the timeliness of his guilty plea.

United States v. Wehr, 20 F.3d 1035 (9th Cir. 1994). The district court properly applied the 2-level reduction for acceptance of responsibility. The defendant challenged the extent of the adjustment on constitutional grounds. Casting his argument in equal protection terms, he averred that the Commission acted irrationally in treating offense levels 15 and below differently from offense levels of 16 and above by providing for different adjustment levels. Noting that criminals do not present a suspect class, the Ninth Circuit interpreted this argument as a due process claim subject only to rational basis review. The court of appeals upheld the proportionality scheme as constitutional. "[A] defendant who accepts responsibility for a more serious offense normally

saves the government more trouble and expense"; thus, there is a rational basis for providing incentives to plea bargain to defendants with higher offense levels.

CHAPTER FOUR: *Criminal History and Criminal Livelihood*

Part A Criminal History

§4A1.1 Criminal History Category

United States v. Govan, No. 97-10275, 1998 WL 461896 (9th Cir. Aug. 3, 1998). The defendant argued that the sentencing guidelines violated due process by providing for an elevated criminal history category based on juvenile and adult misdemeanor offenses. The court of appeals upheld the district court's calculation of the defendant's criminal history and rejected the defendant's contention that consideration of misdemeanor crimes with summary probation and limited jail time results in sentences that are not truly reflective of an individual's criminal background or future criminal behavior. The court of appeals noted that a sentence under the guidelines is highly individualized under historically accepted criteria, which includes the defendant's criminal history, the degree of seriousness of the crime, as well as a more or less refined categorization of criminal offenses. Moreover, a sentencing court is permitted under §4A1.3 to depart from a recommended sentence if it believes that a defendant's criminal history category significantly over-represents the seriousness of his criminal record or the likelihood that he will commit further crimes.

§4A1.2 Definitions and Instructions for Computing Criminal History

United States v. Donaghe, 50 F.3d 608 (9th Cir. 1994). The district court erred in departing upward on grounds that the defendant's criminal history category inadequately reflected his past criminal conduct, where the defendant was convicted more than 15 years earlier of several child molestation crimes. The government argued that the defendant's prior convictions were "similar" to his instant offense of falsifying a passport application because the defendant was motivated to falsify the passport application in order to escape investigation into new child molestation charges. The circuit court rejected this argument, holding that the causal link between the defendant's tendency to molest children and the false application did not make the two crimes "similar" for purposes of USSG §4A1.2 commentary. The district court, on resentencing, "must explain the extent of its departure by analogizing the increased criminal history category or offense level to the next relevant category or offense level."

United States v. Sandoval, 152 F.3d 1190 (9th Cir. 1998). The district court did not err in counting in the defendant's criminal history score a prior conviction for petty theft. The defendant argued that the district court erroneously believed it had no discretion to disregard the conviction. The court of appeals disagreed, finding that under the plain language of USSG §4B1.2(c), the defendant's prior petty theft was not excludable as a matter of law: §4A1.2(c) provides that sentences for misdemeanors and petty offenses are counted, unless they fall within the enumerated exceptions. A conviction for petty theft is not similar to the offenses listed at §4A1.2(c)(2); the

conduct underlying it is not akin to the conduct underlying the excludable offenses. Petty theft requires proof of criminal intent. Moreover, none of the listed offenses involves stealing.

§4A1.3 Adequacy of Criminal History Category (Policy Statement)

United States v. Donaghe, 50 F.3d 608 (9th Cir. 1994). The district court erred in departing upward on grounds that the defendant's criminal history category did not adequately reflect the likelihood that he would commit other crimes based on a 1968 psychiatric evaluation which diagnosed the defendant as a homosexual deviant. The circuit court, reasoning that homosexuality is not an indicator of a defendant's propensity to commit crimes, ruled that homosexuality cannot be used as a departure factor.

United States v. Rodriguez-Martinez, 25 F.3d 797 (9th Cir. 1994). The district court erred in the method it used to depart above the statutory minimum. The court rejected the method, which was similar to one approved by the Fifth Circuit in its decision in United States v. Carpenter, 963 F.2d 736 (5th Cir.), *cert. denied*, 506 U.S. 927 (1992). The government's argument, similar to Carpenter, would permit the court to raise a defendant's offense level so that the mandatory minimum would be encompassed within that guideline range. A mandatory minimum does not alter the manner in which a district court determines the appropriate extent of a departure. In rejecting the government's approach, the Ninth Circuit panel held that the court cannot initially change the defendant's offense range to force conformance with the mandatory minimum; conformance with the minimum is achieved after the range is determined. If after calculating a defendant's offense range the resulting sentencing range is under the statutory minimum, the district court must apply the statutory minimum. If the range includes the minimum, the court may impose a sentence above the minimum to the highest value within that range.

Part B Career Offenders and Criminal Livelihood

§4B1.1 Career Offender

United States v. Carr, 56 F.3d 38 (9th Cir.), *cert. denied*, 516 U.S. 895 (1995). In a matter of first impression, the Ninth Circuit held that the application of the Sentencing Guidelines' career offender provision resulting in a sentence that is "disproportionate" to the offenses involved does not violate the Eighth Amendment's Cruel and Unusual Punishment clause. The defendant was convicted of possession with intent to distribute 66.92 grams of cocaine base and had two prior felony controlled substance offenses for relatively small quantities of drugs. The circuit court ruled that Supreme Court precedent forecloses the defendant's Eighth Amendment argument. *See* Harmelin v. Michigan, 501 U.S. 957, 961, 996 (1991) (plurality opinion) (upholding against an Eighth Amendment challenge a sentence of life without parole for a first offense possession of 672 grams of cocaine); Hutto v. Davis, 454 U.S. 370, 370-71, 375 (1982) (rejecting a challenge to a 40-year sentence for possession of less than nine ounces of marijuana); Rummel v. Estelle, 445 U.S. 263, 265 (1980) (upholding a life sentence imposed under a "recidivist statute" where the three felonies involved were (1) passing a forged check for $28.36, (2) fraudulently using a credit card to obtain $80 worth of goods and services, and (3) obtaining $120.75 by false pretenses). The circuit court noted that although harsh, the defendant's sentence

was less severe relative to his offenses than the sentences upheld in these cases. The appellate court noted precedent in other circuits and held that the defendant's sentence was not so disproportionate to the gravity of his offenses as to violate the Eighth Amendment. *See, e.g.*, United States v. Spencer, 25 F.3d 1105, 1111 (D.C. Cir. 1994); United States v. Garrett, 959 F.2d 1005, 1009 (D.C. Cir. 1992); United States v. Gordon, 953 F.2d 1106, 1107 (8th Cir.), *cert. denied*, 506 U.S. 858 (1992); United States v. McLean, 951 F.2d 1300, 1303-04 (D.C. Cir. 1991).

United States v. Garcia-Cruz, 40 F.3d 986 (9th Cir. 1994). The defendant was convicted in December 1988 as a felon in possession of a firearm. The sentencing court treated this as a crime of violence for purposes of applying the Armed Career Criminal Act, and sentenced him to a 200-month sentence, and the defendant appealed. The government asserted that on resentencing, the defendant should be sentenced under the 1992 version of USSG §2K2.1, in effect at resentencing, or as a career offender under the 1988 version of USSG §4B1.1, in effect at the time of the offense. The district court applied the guidelines most favorable to the defendant, sentencing him to 41 months imprisonment under the 1990 guidelines which were in effect at the time of the original sentencing. The defendant appealed from this sentence, asserting that amendments made to USSG §4B1.1 should have been applied retroactively because they clarified that the offense of being a felon in possession of a firearm was not a crime of violence for purposes of USSG §4B1.1. The appellate court noted that the United States Supreme Court's decision in Stinson v. United States, 113 S. Ct. 1913 (1993) makes it clear that guideline commentary must be given controlling weight. "With the benefit of Stinson we can comfortably conclude that applying the 1988 guidelines to Garcia-Cruz in light of the commentary would not qualify him as a career offender under Section 4B1.1." The defendant must be resentenced in light of this.

United States v. Heim, 15 F.3d 830 (9th Cir.), *cert. denied*, 513 U.S. 808 (1994). The district court correctly sentenced the defendant as a career offender pursuant to USSG §§4B1.1 and 4B1.2. The defendant challenged the district court's application of the career offender guidelines on the grounds that the Sentencing Commission exceeded its statutory authority under 28 U.S.C. § 994(h) by including conspiracy within the definition of "controlled substance offense." He relied on United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993), in which the District of Columbia Circuit concluded that the elements of a conspiracy are different from the elements necessary for the substantive crime and that conspiracy to violate the Controlled Substances Act is not included in 21 U.S.C. § 841, the portion of the act which prohibits substantive drug offenses. The Price court further opined that since the Commission relied on section 994(h) as its enabling statute for USSG §§4B1.1 and 4B1.2, including conspiracy within the definition of "controlled substance offense" was legally invalid. *Id.* at 1370. The Ninth Circuit declined to accept the holding of Price and determined instead that the career offender guidelines should be read less restrictively. The commentary to USSG §4B1.1 does not say that section 994(h) is the sole statutory authority for the promulgation of the career offender guidelines. Specifically, the guidelines are issued pursuant to 28 U.S.C. § 994(a)(1), which authorizes the Commission to promulgate guidelines, and section 994(a)(2), which governs the Commission's role in implementing general policy statements and any other aspect of sentencing that would further the purposes established under 18 U.S.C. § 3553(a)(2). Additionally, the Ninth Circuit considered the legislative history to §994(h) and determined that the Senate Report

clearly indicated that section 994(h) was not the sole enabling statute for the career offender guidelines. Thus, the court of appeals held that the Commission did not exceed its statutory authority by including conspiracy within the definition of "controlled substance offense."

§4B1.4 Armed Career Criminal

United States v. Canon, 66 F.3d 1073 (9th Cir. 1995). The district court violated the ex post facto clause when it considered a provision which was not a part of the 1989 version of the guidelines in calculating the defendant's base offense level. The defendant qualified as an armed career criminal pursuant to 18 U.S.C. § 924(e) which carried a 15-year mandatory minimum sentence. The 1989 version of the guidelines, however, did not mention the Armed Career Criminal Act. The district court departed upward for a number of factors including the defendant's extensive criminal history, and used the armed career criminal section in the 1990 version of the guidelines as a guide in reaching a base offense level of 34, resulting in a sentence of 327 months imprisonment. The circuit court ruled that a departure for violent offenses already considered in calculating the defendant's criminal history is an impermissible basis for departure. The circuit court noted that under the 1989 guidelines, "any upward departure founded on the underrepresented seriousness of their past criminal conduct could not be based merely on the violence of the past crime, and had to be `horizontal' . . . ." The circuit court ruled that although the 1990 version of the guidelines provided for an enhanced offense level for armed career criminals, the district court improperly used USSG §4B1.4 as a guide, subjecting the defendant to the "detrimental ex post facto effect" of USSG §4B1.4. The circuit court rejected the Tenth Circuit's stand on this issue. The Tenth Circuit, in United States v. Tisdale, 7 F.3d 957, 965-68 (10th Cir. 1993), *cert. denied*, 510 U.S. 1169 (1994), permitted the use of USSG §4B1.4 as a retroactive guide to discretion, ruling that such practice did not violate the ex post facto clause because the court "made it clear that it was not applying the later guideline, but only using it as a benchmark or analogue."

United States v. Phillips, 149 F.3d 1026 (9th Cir. 1998). The district court erred in failing to sentence the defendant as an armed career criminal. The district court had ruled that two burglaries committed by the defendant on October 21 and October 22, 1981, were not committed on occasions different from one another, for purposes of the Armed Career Criminal Act (ACCA). Near midnight on October 21, 1981, the defendant and an accomplice burglarized a barbershop; shortly thereafter, they burglarized an adjacent business. The court of appeals held that the burglaries were “temporally distinct” and therefore qualified as predicate offenses for the ACCA.

CHAPTER FIVE: *Determining the Sentence*

Part C Imprisonment

§5C1.2 Limitation on Applicability of Statutory Minimum Sentence in Certain Cases

United States v. Contreras, 136 F.3d 1245 (1998). The Ninth Circuit, joined by the First and Fifth Circuits, held that the term "the government," as used in the provision of the safety valve statute (§5C1.2(5)) requiring the defendant to truthfully disclose all information and evidence in order to qualify for a reduced sentence, refers to the prosecuting attorney. The appellate court rejected the defendant's argument that his disclosures to his probation officer qualified him for a safety valve sentence reduction. The appellate court relied, in part, on §5C1.2, Application Note 8, which cross-references to Federal Rule 32(c)(1). Rule 32(C)(1) refers to the "counsel for the government" and to the "attorney for the government" when discussing the government's opportunity to make a §5C1.2(5) recommendation. *See* United States v. Jimenez-Martinez, 83 F.3d 488, 495 (1st Cir. 1996); United States v. Rodriguez, 60 F.3d 193 (5th Cir.), *cert. denied*, 516 U.S. 1000 (1995).

United States v. Miller, 151 F.3d 957 (9th Cir. 1998). The district court did not err in finding that the defendant did not qualify for the safety valve when he failed to disclose all he knew about relevant conduct that is part of the same course of conduct or common scheme as the offense for which he was convicted. The court of appeals had previously decided this issue in United States v. Washman, 128 F.3d 1305 (9th Cir. 1997), but had not addressed the statutory argument raised by defendant Miller. Miller argued that use of the term "offense or offenses" in the safety valve statute limits the disclosure required to the offense of conviction. The court of appeals reasoned that because 18 U.S.C. § 3553(f)(5) on its face requires disclosure "concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, it plainly includes uncharged related conduct. Therefore a defendant who does not disclose all information he has concerning the offense of conviction and offenses that were part of the same course of conduct is not entitled to safety valve relief.

United States v. Valencia-Andrade, 72 F.3d 770 (9th Cir. 1995). The district court did not err in ruling that it lacked the authority to impose a sentence below the mandatory minimum, not withstanding its finding that the defendant's criminal history category was overrepresented. In this case, the defendant pleaded guilty to possession of methamphetamine with intent to distribute. This offense carries a mandatory minimum term of ten years. See 21 U.S.C. § 841(b)(1)(A)(viii). The defendant argued that the judge should have departed from the mandatory minimum because "the obvious intent of Congress was to mitigate the harsh results of mandatory minimum sentences when a person has virtually no criminal history." The defendant's prior criminal history consisted solely of two convictions for driving with a suspended license. Pursuant to USSG §§4A1.1(c), 4A1.2(c)(1), the defendant was assigned 2 criminal history points which placed the defendant in Criminal History Category II. The circuit court held that 18 U.S.C. § 3553(f)(1) expressly precludes a downward departure from the mandatory minimum if the defendant has more than 1 criminal history point. The circuit court stated "where the criminal history category over-represents the seriousness of a defendant's prior criminal history, only Congress can provide a remedy."

Part D Supervised Release

§5D1.1 Supervised Release

United States v. Eyler, 67 F.3d 1386 (9th Cir. 1995). The district court erred when it conditioned the defendant's supervised release on the repayment of the attorneys fees paid to his court-appointed counsel under the Criminal Justice Act. The defendant was convicted of possession of unregistered machine guns and of being a felon in possession of a firearm and was sentenced to 66 months imprisonment as well as a term of supervised release conditioned on repayment of defense costs. In a matter of first impression, the Ninth Circuit ruled that the district court's order the defendant repay defense costs violated 18 U.S.C. § 3583(d) and exceeded the district court's authority. The circuit court noted that conditions of supervised release must comply with 18 U.S.C. § 3583(d) which sets out certain mandatory conditions. The first requirement is that the condition be "reasonably related" to the "goals of rehabilitation, deterrence, protection of the public, and training or treatment." The circuit court ruled that the recoupment order failed to meet this mandatory requirement, and thereby violated the statute.

United States v. Soto-Olivas, 44 F.3d 788 (9th Cir.), *cert. denied*, 515 U.S. 1127 (1995). The Ninth Circuit ruled that the defendant's rights under the Double Jeopardy Clause were not violated by his prosecution for illegally reentering the United States, even though this reentry resulted in revocation of his term of supervised release imposed as punishment for an earlier offense. The defendant argued that revocation of supervised release constitutes double jeopardy because, unlike parole or probation revocation, revocation of supervised release constitutes punishment for the act which causes the revocation, not the original crime. He contended that because supervised release is imposed in addition to the original sentence, and not instead of it, any imprisonment resulting from a supervised release violation cannot be part of the original sentence but rather punishment for the new act constituting the violation. The circuit court disagreed, reasoning that the plain language of the supervised release statute states that supervised release, although imposed in addition to incarceration, is still considered "a part of the sentence." 18 U.S.C. § 3583(a). Thus, the circuit court ruled that revocation of the defendant's's supervised release did not violate the double jeopardy clause because his entire sentence, including the period of supervised release, was punishment for the original crime. Citing United States v. Paskow, 11 F.3d 873, 881 (9th Cir. 1993), the Ninth Circuit concluded that "`it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms' of his release."

Part E Restitution, Fines, Assessments, Forfeitures

§5E1.1 Restitution

United States v. Dubose 146 F.3d 1141 (9th Cir. 1998). The court of appeals upheld the Mandatory Victims Restitution Act (MVRA), 18 U.S.C. §§ 3663A-3664, against constitutional challenges. The defendants were convicted of a church arson which resulted in $121,403 in damages. They contended that restitution orders that require full compensation in the amount of the victim's loss are grossly disproportionate tot he crime committed and violate the Eighth Amendment's proscription against excessive fines. They also argued that the imposition of a restitution obligation that is enforceable through a civil action for 20 years after their release from

prison is cruel and unusual punishment, in violation of the Eighth Amendment. The court rejected both arguments. First, the full amount of restitution is inherently linked to the culpability of the defendant. Second, the victim is limited to the recovery of specified losses, and restitution is ordered only after adjudication of guilt. Moreover, the district court has the discretion to impose a nominal payment schedule, and the defendant is not subject to resentencing for nonpayment unless he did not make bona fide efforts to pay.

United States v. Reed, 80 F.3d 1419 (9th Cir.), *cert. denied*, 117 S. Ct. 211 (1996). The district court erred in ordering the defendant to pay restitution under the Victim and Witness Protection Act (VWPA), 18 U.S.C. §§ 3663-64. The defendant, allegedly in a stolen vehicle, was involved in a high-speed chase with the police, which ended with the defendant crashing into several other vehicles. After the defendant pleaded guilty to being a felon in possession of a firearm, the district court ordered the defendant to pay restitution for the damage caused to the other vehicles. Relying on Hughey v. United States, 495 U.S. 411 (1990), the defendant argued that restitution is not appropriate because, under VWPA, restitution may be imposed "only for the loss caused by the specific conduct that is the basis of the offense of conviction." The government's contention, however, was based on two Sixth Circuit cases that were implicitly overruled by Hughey and explicitly overruled by subsequent Sixth Circuit cases. The First, Fourth, Ninth, and Tenth Circuits have similarly held that restitution may only be ordered for losses caused by conduct for which the defendant has been convicted. The circuit court noted that the VWPA was amended subsequent to the Supreme Court's ruling in Hughey. However, this amendment, which allows for restitution for losses occurring as a result of a scheme, conspiracy, or pattern of criminal activity, was irrelevant in this case because the defendant was not convicted of such an offense.

United States v. Riley, 143 F.3d 1289 (9th Cir. 1998). The district court erred in ordering the defendant to pay restitution for an amount outstanding on a car loan. Under the Victim and Witness Protection Act, a defendant can only be ordered to pay restitution for conduct that was part of the scheme, conspiracy, or pattern of criminal activity. The defendant's auto loan was not part of the tax fraud scheme of which he was convicted, even though the proceeds from the scheme were used as a down payment on the car.

United States v. Stoddard, 150 F.3d 1140 (9th Cir. 1998). The district court erred in ordering restitution of $116,223 after finding only $30,000 in actual loss resulting from the defendant’s fraud conviction. The court of appeals reiterated that restitution can only include losses directly resulting from a defendant’s offense; consequential expenses may not be legally included in an order of restitution.

§5E1.2 Fines for Individual Defendants

United States v. Gray, 31 F.3d 1443 (9th Cir. 1994). Contrary to the defendant's argument, the district court did have the authority to depart upward from a fine range of $3,000-$30,000 to $250,000. However, because the district court failed to (1) make a finding as to whether the aggravating circumstances were taken into consideration by the Sentencing Commission in promulgating the guidelines, and (2) failed to address how or why it arrived at such an amount, the circuit court vacated the fine and remanded the case. The defendant further

contended that the district court did not have the authority to depart upward because the language of §5E1.2(b) limits departures from the applicable fine range to either §5E1.2(f), which allows a downward departure if a defendant is unable to pay a fine or if a fine would unduly burden a defendant's dependents, or §5E1.2(i), which allows the imposition of an additional fine in an amount that is sufficient to pay the costs of imprisonment, probation or supervised release. In rejecting the defendant's argument, the circuit court held that "the fact that the guidelines identify two grounds for departure does not preclude a district court from departing on a different basis." **Note**: §5E1.2 was amended effective November 1, 1997.

United States v. Robinson, 20 F.3d 1030 (9th Cir. 1994). The district court erred in failing to determine at the time of sentencing the defendants' future ability to pay the fine imposed. Although the guidelines do not state explicitly that the sentencing court must assess the future payment ability before imposing the fine, the structure of USSG §5E1.2 strongly implies such a requirement. The language of §5E1.2, particularly that the district court must decide whether the defendant "established" the present and likely future inability to pay, indicates that the assessment must be made before the sentence is imposed. The district court also erred in imposing as an alternative a period of community service in the event the defendants were unable to pay their fines. Community service cannot be imposed as a fallback punishment, but must be imposed as an alternative sanction in lieu of all or a portion of a fine. USSG §5E1.2(f). Such an alternate sentence violates 18 U.S.C. § 3572(e).

United States v. Zakhor, 58 F.3d 464 (9th Cir. 1995). The defendant challenged the constitutionality of USSG §5E1.2(i) and the Sentencing Commission's statutory authority to promulgate the guideline. The defendant was sentenced to three years' probation and ordered to pay more than $20,000 in fines and restitution, including a $6,500 find under §5E1.2(i) to cover the costs of community supervision. The appellate court upheld the district court's imposition of the fine covering the cost of community supervision. "Section 5E1.2(i) advances the deterrent purpose articulated in the Sentencing Reform Act by establishing the cost of incarceration as another cost a would-be criminal may have to face if he commits the criminal act and is caught. This deters criminal conduct by making the potential criminal internalize all the costs of such conduct." In so holding, the Ninth Circuit declined to follow the Third Circuit's approach in United States v. Spiropoulos, 976 F.2d 155 (3d Cir. 1992), which invalidated the guideline because it did not find that the Sentencing Reform Act made any specific reference to assessing the costs of imprisonment. The appellate court further held that the guideline does not deprive the defendant of his property without due process, in violation of the Fifth Amendment because it bears a "rational relationship to a legitimate government purpose." **Note**: §5E1.2 was amended on this issue effective November 1, 1997 (amendment 572).

Part G Implementing The Total Sentence of Imprisonment

§5G1.2 Sentencing on Multiple Counts of Conviction

United States v. Palomba, 31 F.3d 1456 (9th Cir. 1994). The defendant's assertion that two of his counts in the superseding indictment violated the 30-day limit set forth in the Speedy Trial Act (STA) is correct. The appellate court rejected the notion that the error was harmless and nonprejudicial, because even in a successful challenge to the untimely counts, the district court would still consider the counts as relevant conduct. Here, the violation could be prejudicial to the defendant because (1) he is a repeat offender and his criminal history category would increase by 3 levels in the event of a future federal conviction; (2) in the event of a "Draconian recidivist statute, the mail fraud convictions might leave appellant with no remaining `strikes' against him and result in a disproportionate sentence for even a minor future conviction in state court"; and (3) the improper convictions could result in additional stigma, and possibly be used to impeach the defendant's credibility in future proceedings. Accordingly, the STA violation resulted in prejudice to the defendant.

§5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment

United States v. Garrett, 56 F.3d 1207 (9th Cir. 1995). The district court erred in failing to properly consider the commentary methodology of guideline §5G1.3(C) or to explain its reasons for using an alternative methodology in sentencing the defendant. The district court calculated a sentence for the single, federal crime and determined that it should run concurrent with the undischarged portion of the defendant's state sentence. The Sixth Circuit vacated the defendant's sentence because the district court did not make a determination on the record that the incremental punishment was reasonable, and because it did not make the necessary preliminary determination of guideline §5G1.3 in which the court should approximate the total punishment that would have been imposed had all the offenses been federal offenses sentenced simultaneously. **Note**: §5G1.3 was amended on this issue effective November 1, 1997 (amendment 535).

United States v. Kikuyama, 150 F.3d 1210 (9th Cir. 1998). The district court did not err in imposing consecutive sentences of 12 months' incarceration for violation of supervised release and 46 months' incarceration for bank robbery. The court of appeals noted that, in exercising its discretion to impose concurrent, partially concurrent, or consecutive sentences, the district court should consider the factors set out in the statute governing imposition of a sentence, 18 U.S.C. § 3553(a), as well as the factors listed at USSG §5G1.3, comment. (n.3). In this case, the court cited three factors that weighed in favor of imposing consecutive sentences: defendant's previous adjudications on several occasions as a juvenile, defendant's prior manslaughter conviction, and defendant's escalating criminal behavior, which provided the appearance of enhanced dangerousness. Therefore, the district court acted within its discretion in assessing consecutive sentences.

United States v. Redman, 35 F.3d 437 (9th Cir. 1994), *cert. denied*, 513 U.S. 1120 (1995). The district court did not err in imposing upon the defendant an 18-month sentence to run consecutive to his 36-month state term of imprisonment. The defendant was convicted and

sentenced on a state charge of second degree theft. He then pleaded guilty to a federal charge of conspiracy to aid and assist an escape. The district court considered USSG §5G1.3(c), but because the defendant would not receive any incremental punishment under subsection (c), the district court departed downward from the defendant's criminal history category by discounting the 3 levels from his state offense. The district court then sentenced the defendant to the bottom of the range and ordered that the resulting 18 months be imposed consecutive to the defendant's state sentence. The defendant argued that the district court misapplied the guidelines. The circuit court disagreed. Section 5C1.3(c) is unlike subsections (a) and (b) because it is only a policy statement. Further, the Commission's amendment of the commentary, changing the "shall consider" language of the 1991 version of USSG §5G1.3(c) to "should consider" language in the current version, indicates that the Commission expects that the sentencing court will consider USSG §5G1.3(c), but if that court decides that the commentary methodology will not yield a reasonable incremental penalty, the court may decline to impose a sentence pursuant to the commentary. Such a sentence is not a departure; however, the district court must give its reasons for choosing an alternative method. The district court did all that it was required to do. *But see* United States v. Duranseau, 26 F.3d 804 (8th Cir.), *cert. denied*, 513 U.S. 939 (1994) (the district court must apply a departure analysis when using a methodology different from that provided by USSG §5G1.3(c)). **Note**: §5G1.3 was amended on this issue effective November 1, 1997 (amendment 535).

United States v. Scarano, 76 F.3d 1471 (9th Cir. 1996). The court did not err in imposing consecutive sentences upon defendant convicted of two counts of mail fraud despite the fact that one offense was preguidelines and one offense was post-guidelines. The court rejected both defendant's argument that the imposition of consecutive sentences violated the Double Jeopardy clause and his argument that consecutive sentences violated the sentencing guidelines. The defendant argued that the calculation of loss of his sentence to include an amount of loss previously counted toward a preguidelines sentence violated the Double Jeopardy clause. However, the court relied on the decision in Witte v. United States, 515 U.S. 389 (1995), which held that the use of relevant criminal conduct to enhance a penalty for an offense of conviction within statutory limits does not constitute "punishment" for the relevant conduct, to reject this argument. The court also rejected defendant's argument that aggregating the amount of loss for both the pre- and post-guidelines offenses was equivalent to treating both offenses as if they were post-guidelines offenses. Precedent supported the finding that courts have discretion to impose either concurrent or consecutive sentences upon a defendant convicted of a preguidelines offense. The court noted the factors to be considered in exercising this discretion to include the following: 1) nature of the offense, 2) history and characteristics of the defendant, 3) the need for deterrence, and 4) available sentences under the guidelines.

Part H Specific Offender Characteristics

§5H1.12 Lack of Guidance as a Youth and Similar Circumstances (Policy Statement)

United States v. Burrows, 36 F.3d 875 (9th Cir. 1994). The government conceded that the district court erred in retroactively applying USSG §5H1.12, which prohibits downward departures for youthful lack of guidance, to the defendant's sentence. This departure was originally established in United States v. Floyd, 945 F.2d 1096 (9th Cir. 1991), overruled on other

grounds, 990 F.2d 501 (9th Cir. 1993). The circuit court concluded that while the promulgation of USSG §5H1.12 in 1992 "wiped out" the availability of this departure in subsequent cases, the departure was available to this defendant, because retroactive application of the guideline violates the ex post facto clause. The case was remanded for the district court to consider whether this defendant warranted a departure based on youthful lack of guidance.

Part K Departures

Standard of Appellate Review—Departures and Refusals to Depart

§5K1.1 Substantial Assistance to Authorities (Policy Statement)

United States v. Emery, 34 F.3d 911 (9th Cir. 1994). The district court did not err in concluding that it did not have jurisdiction to grant the defendant a departure pursuant to USSG §5K1.1. The defendant argued that he was entitled to a substantial assistance downward departure because he assisted the state in a drug conspiracy investigation when he agreed to withdraw his motion to unseal the search warrant. The circuit court concluded that the district court was without authority to depart because the government failed to file a substantial assistance motion. However, the circuit court noted that the government may have been under the mistaken impression that a USSG §5K1.1 recommendation was unavailable because the assistance was provided to the state authorities; accordingly, the circuit court instructed the United States attorney's office to reexamine whether such a recommendation was warranted.

See United States v. Mukai, 26 F.3d 953 (9th Cir. 1994), Ch. 1, Pt. A, p. 1.

United States v. Treleaven, 35 F.3d 458 (9th Cir. 1994). The district court erred in refusing to grant the defendant a substantial assistance downward departure, even though the government did not make a motion for such a departure. The circuit court ruled that the government acted improperly in refusing the defendant's offer to testify against other defendants in exchange for a downward departure, and then later making ex parte contact with the defendant, subpoenaing him to testify at a grand jury proceeding without notifying his counsel or obtaining his counsel's consent. The circuit court concluded that if the government had properly notified the defendant's counsel and allowed the defendant an adequate opportunity to consult with him before testifying, the defendant may have obtained a written promise to move for a downward departure. Thus, in light of the government's improper conduct, the district court should have granted the defendant's request for a downward departure.

§5K2.0 Grounds for Departure (Policy Statement)

United States Supreme Court

Koon v. United States, 518 U.S. 81 (1996). The Supreme Court unanimously held that an "appellate court should not review the [district court's] departure decision *de novo*, but instead should ask whether the sentencing court abused its discretion." In applying this standard, the court noted that "[l]ittle turns, however, on whether we label review of this particular question [of whether a factor is a permissible basis for departure] abuse of discretion or *de novo*, for an abuse

of discretion standard does not mean a mistake of law is beyond appellate correction." "The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." The court divided, however, in its determination of whether the district court abused its discretion in relying on the particular factors in this case. The majority of the court held that the Ninth Circuit erroneously rejected three of the five downward departure factors relied upon by the district court. The district court properly based its downward departure on (1) the victim's misconduct in provoking the defendants' excessive force, §5K2.10; (2) the defendants' susceptibility to abuse in prison; and (3) the "significant burden" of a federal conviction following a lengthy state trial which had ended in acquittal based on the same underlying conduct. However, the district court abused its discretion in relying upon the remaining two factors, low likelihood of recidivism, and the defendants' loss of their law enforcement careers, because these were already adequately considered by the Commission in USSG §§2H1.4 and 4A1.3. The judgment of the Court of Appeals for the Ninth Circuit was affirmed in part and reversed in part, and the case was remanded for further proceedings.

United States v. Cuddy, 147 F.3d 1111 (9th Cir. 1998). The district court properly departed upward by 2 levels based on the defendants' threats to the extortion victim's daughter. The defendants were convicted of interference with interstate commerce by threats of violence after kidnaping the daughter of a hotel owner and demanding ransom. The district court departed upward based on USSG §2B3.2, n. 8, which states that an upward departure may be warranted if the offense involved a threat to a family member of the victim. The victim of the extortion was the hotel owner and the defendants explicitly threatened his daughter's life.

United States v. Daggao, 28 F.3d 985 (9th Cir. 1994), *cert. denied*, 514 U.S. 1031 (1995). The district court did not err in refusing to grant the defendant a downward departure based on time spent under in-house detention. The Attorney General has the sole authority to grant credit for time served in detention before sentencing and that authority cannot be circumvented by downward departures. *But see*, United States v. Miller, 991 F.2d 552 (9th Cir. 1993) (downward departure appropriate when the defendant's in-house detention served erroneously).

United States v. Donaghe, 50 F.3d 608 (9th Cir. 1994). The district court erred in making an upward departure based on its determination that the defendant's base offense level for making a false statement in a passport application was inadequate because he was being investigated for possible sexual misconduct with his nephew at the time he was being sentenced. The government argued that a upward departure was warranted because the defendant's motive in falsifying his passport was to escape possible prosecution for sexual misconduct. The circuit court disagreed, reasoning that the version of USSG §5K2.0 in effect at the time of sentencing allowed departures based on additional "harms" only when the harms were relevant to the offense of conviction. Intending to use the false passport for purposes of escaping criminal prosecution is not an element of the crime of making a false statement in a passport application. Thus, the circuit court held, the defendant's reason for wanting a fake passport was not relevant to the offense of falsifying the application, and could not be used as a departure factor.

United States v. Fontenot, 14 F.3d 1364 (9th Cir.), *cert. denied*, 513 U.S. 966 (1994). The district court did not err in departing from a defendant's guideline sentencing range of 57-77

months for interstate travel to contract a murder for hire of his wife to impose a sentence of 108 months based on the defendant's profit motive and more than minimal planning. The record indicated that the defendant had taken out a $100,000 life insurance policy on his wife, and had made multiple long distance phone calls, in addition to engaging in interstate travel, to facilitate the offense.

United States v. G.L., 143 F.3d 1249 (9th Cir. 1998). The court erred in departing on two grounds. First, a finding that grouping of the defendant's auto theft offenses did not result in sufficient punishment was an improper basis for departure. The three auto thefts were overshadowed by the defendant's conviction for involuntary manslaughter. The court of appeals held that the correct course is a sentence in the upper regions of the guidelines range rather than a departure. The court of appeals also rejected as a basis for departure the fact that the stolen vehicles were destroyed. Under the guidelines, the court noted, the loss figure is the same whether or not the stolen property is recovered. Thus, the guidelines adequately take into account the destruction of the vehicles.

United States v. Green, 152 F.3d 1202 (9th Cir. 1998). The district court did not err in departing downward, even though one of the bases it articulated for departure was invalid. One basis for departure, defendant's post-sentencing rehabilitation, had arguably been rejected in the past by the court of appeals in United States v. Gomez-Padilla, 972 F.2d 284 (9th Cir. 1992). However, the court of appeals held that Gomez-Padilla is no longer controlling authority in light of Koon v. United States, 518 U.S. 81 (1996). The Ninth Circuit joined three other circuits which, following Koon, have held that post-sentencing rehabilitation is a proper basis for departure. *See* United States v. Rhodes, 145 F.3d 1375 (D.C. Cir. 1998); United States v. Core, 125 F.3d 74, 77 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 735 (1998); United States v. Sally, 116 F.3d 76 (1997). The court of appeals rejected the other stated basis for departure, California's view of marijuana. California has not legalized the defendant's actions, cultivation with the intent to sell; nor was there any argument that the defendant was cultivating marijuana for medicinal purposes. The court of appeals determined, however, that the district court's level of departure would not have been different had it not taken into account this factor, so no reversed or remand was required.

United States v. Hines, 26 F.3d 1469 (9th Cir. 1994). The district court did not err in departing upward 3 levels based on the defendant's extraordinarily dangerous mental state. The defendant asserted that the district court did not have the authority to depart on such a basis, relying on United States v. Doering, 909 F.2d 392 (9th Cir. 1990), in which the Ninth Circuit reversed an upward departure that was based on the defendant's need for psychiatric treatment. The circuit court distinguished the instant case from Doering because the instant departure was not based on the defendant's need of psychiatric treatment; rather, the departure was imposed because the defendant's serious psychiatric disorders posed an extraordinary danger to the community. However, the circuit court remanded with a limited instruction to the district court to articulate the reasons for the extent of the departure.

United States v. Ono, 997 F.2d 647 (9th Cir. 1993), *cert. denied*, 510 U.S. 1063 (1994). The district court did not err in making a 10-level upward departure based on the potency of a synthetic drug not listed in the guidelines. The defendant was convicted of conspiracy to

manufacture OPP/PPP, which is not listed in the guidelines. The district court had authority to depart, stated adequate reasons for its departure, and made a reasonable departure. *See* United States v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1991) (en banc).

United States v. Pacheco-Osuna, 23 F.3d 269 (9th Cir. 1994). The district court erred in departing downward based on possible violations of the fourth amendment. The defendant pleaded guilty to being a deported alien found in the United States in violation of 8 U.S.C. § 1326(a). He averred at sentencing that he was arrested merely because he looked Mexican and that this constitutional violation entitled him to a downward departure. The district court agreed and granted the departure. The circuit court reversed, concluding that Fourth Amendment violations do not warrant downward departures because constitutional violations do not speak to the defendant's culpability. *See* United States v. Crippen, 961 F.2d 882 (9th Cir.), *cert. denied*, 506 U.S. 965 (1992) (ineffective assistance of counsel not proper departure basis; a permissible "aggravating or mitigating circumstance" is one that relates to the defendant's culpability or the seriousness of the offense or "otherwise relate[s] to a congressionally authorized legitimate sentencing concern.").

United States v. Ponce, 51 F.3d 820 (9th Cir. 1995). The district court did not err in departing upward 2 levels based on the size and sophistication of the defendants' drug trafficking operation. The defendants claimed the departure improperly considered the quantity of drugs. The appellate court noted that it had already rejected this argument in United States v. Shields, 939 F.2d 780 (9th Cir. 1991), wherein it stated that "Common sense requires the conclusion that duration is not the same thing as quantity. A judge could easily find that a 14-month drug conspiracy is more serious than a single episode of importation." Shields, 939 F.2d at 783. The district court correctly based its departure on the "harm to society, the sophisticated nature of the offense, and the long duration of the conspiracy." 18 U.S.C. § 3443(b). The appellate court ruled that the district court did not abuse its discretion by departing upwards 2 levels due to the considerable length and sophistication of the drug trafficking operation.

United States v. Rose, 20 F.3d 367 (9th Cir. 1994). The district court properly denied the defendant's request for downward departure based on sentencing disparity. The defendant argued that a downward departure was warranted because USSG §2S1.1 imposes stricter punishment for conduct underlying the money laundering counts that also underlies the wire fraud counts. The circuit court relied on the commentary of §2S1.1 in concluding that the Commission intended to impose harsher penalties on defendants convicted under 18 U.S.C. § 9156(a)(1)(A). Thus, the resulting sentencing disparity is not a valid departure basis.

United States v. Staufer, 38 F.3d 1103 (9th Cir. 1994). The district court erred in refusing to consider whether the defendant warranted a downward departure from his guideline sentence on the basis of sentencing entrapment. The defendant was a user and infrequent seller of LSD, but was not predisposed to sell the amount of LSD required by the government agent. The district court had agreed that sentencing entrapment should be recognized as a proper ground for departure, but declined to depart because it believed it lacked the authority to do so. The circuit court noted that the First and Eighth Circuits have decided that sentencing entrapment may be a valid basis for a downward departure in some instances, but that the Eleventh Circuit had rejected the sentencing entrapment theory. *See* United States v. Connell, 960 F.2d 191, 196 (1st Cir.

1992); United States v. Lenfesty, 923 F.2d 1293, 1300 (8th Cir.), *cert. denied*, 499 U.S. 968 (1991); *but see* United States v. Williams, 954 F.2d 668, 673 (11th Cir. 1992) (rejecting sentencing entrapment). In deciding an issue of first impression in the Ninth Circuit, the appellate court concluded that the presence of sentencing entrapment may be the basis for a downward departure. In this case, the court found that such a downward departure was warranted because the defendant was not predisposed "to involve himself . . . in an immense amount of drugs." The circuit court noted that its findings were consistent with both the recent amendment to the guidelines allowing departures in certain instances where the government structures a reverse sting operation, *see* USSG §2D1.1, comment. (n. 17) (Nov. 1993), and with sentencing factors prescribed by Congress.

United States v. Ullyses-Salazar, 28 F.3d 932 (9th Cir. 1994), *cert. denied*, 514 U.S. 1020 (1995). The district court did not err in refusing to depart downward in sentencing the defendant for illegally reentering the United States based on erroneous information provided in an Immigration and Naturalization form. The defendant had signed a Form I-294 upon his deportation one year earlier which stated that he would be subject to no more than two years' imprisonment if he reentered illegally. The statute on which the information in the form was based had been amended in 1988 to provide for imprisonment of up to 15 years for aliens like the defendant who had been convicted of aggravated felonies, yet the INS had not changed the form to reflect this amendment. The circuit court held that the doctrine of equitable estoppel did not justify a downward departure as the INS's failure to revise the form was not affirmative misconduct, as required to estop the government. The circuit court also held that a downward departure was not justified by the unique circumstances of the case. A departure based solely upon government misconduct and not on circumstances of the offense or the offender's character is improper, since it would have no relation to the goals of the Sentencing Reform Act.

United States v. Walker, 27 F.3d 417 (9th Cir.), *cert. denied*, 513 U.S. 955 (1994). The district court did not err in denying the defendant a downward departure based on "self-inflicted punishment." The defendant argued at his sentencing that he was entitled to a downward departure because he suffered anxiety attacks, had difficulty sleeping and was placed on antidepressant drugs. The circuit court concluded that what the defendant suffered was nothing more than post-arrest emotional trauma, which is a natural result of being charged with a crime. The court cited the Sixth Circuit to support its conclusion that allowing such departures would result in barrage of disingenuous appeals. United States v. Harpst, 949 F.2d 860 (6th Cir. 1991) (rejected suicidal tendencies as departure basis because it would create boilerplate appeals for every defendant).

United States v. Zamora, 37 F.3d 531 (9th Cir. 1994). The district court erred in departing upward. The defendant defrauded DEA agents by selling them less than the agreed amount of cocaine. The district court departed upwards 5 levels based on its finding that there is a greater risk of violence during an attempted drug fraud than an actual drug sale. The extent of the departure was calculated by way of analogy to the fraud guideline. The circuit court determined that the danger of violence was an aggravating factor already taken into account by the guidelines since the guidelines provide for sentencing enhancements for possession of a weapon during a drug trafficking offense. "Possession of a gun . . . is dangerous precisely—and only—because it may be used when one drug trafficker tries to cheat or rob another or when law

enforcement officials try to apprehend a drug trafficker." Further, the defendant's mandatory five-year sentence pursuant to 18 U.S.C. § 924(c)(1) adequately reflected the increased likelihood of violence associated with the fraudulent drug sale.

§5K2.3 Extreme Psychological Injury (Policy Statement)

United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). The defendant challenged the district court's upward departure made pursuant to USSG §5K2.3 based on the psychological damage suffered by the family of a missing child when he falsely reported that he knew the whereabouts of the child's body and the identity of her assailant. The appellate court affirmed the departure, holding that the family was singled out by the defendant, and thus, along with the government, was a victim of his false statements. Furthermore, the evidence supported the finding that the child's mother suffered serious psychological injury and physical impairment. The appellate court also rejected the defendant's assertion that the departure would constitute impermissible double counting because the conduct was already punished under the Vulnerable Victim adjustment of USSG §3A1.1. "There is no double counting if the extra punishment is attributable to different aspects of the defendant's criminal conduct." Section 5K2.3 focuses on the harm the defendant caused his victims, section 3A1.1 punishes the defendant for his choice of a victim who is vulnerable to his offense.

§5K2.5 Property Damage or Loss (Policy Statement)

United States v. Dayea, 32 F.3d 1377 (9th Cir. 1994). The district court erred in making an upward departure based on its finding that the defendant's conduct resulted in property damage or loss not taken into account by the guidelines, where the defendant caused a fatal automobile accident while he was intoxicated. The circuit court noted that the district court's calculation of $165,000 in damages included only $13,595.43 actually due to property damage. The remainder was based on consequential financial losses to the victim's widow. A departure under USSG §5K2.5, the circuit court reasoned, may be based only on property damage or loss, and not other harms. In this case, the circuit court noted, the amount of actual property damages attributable to the defendant's conduct was not sufficient to warrant an upward departure.

§5K2.7 Disruption of Governmental Function (Policy Statement)

United States v. Dayea, 32 F.3d 1377 (9th Cir. 1994). The district court erred in making an upward departure based on a finding that the defendant's conduct resulted in a significant disruption of governmental function and significantly endangered the public welfare, where the defendant caused an automobile accident resulting in the death of an officer of the Arizona Department of Public Safety. The circuit court held that the evidence on which the departure was based, namely testimony from the victim's co-worker that the victim's death negatively affected other co-workers' concentration at work, was insufficient to support a finding that the department's functioning was significantly impaired or that the public welfare was significantly endangered. The fact that officers were stressed by the victim's death, the circuit court reasoned, did not demonstrate any actual disruption of police activity.

§5K2.8 Extreme Conduct (Policy Statement)

United States v. Haggard, 41 F.3d 1320 (9th Cir. 1994). The defendant challenged the district court's upward departure made pursuant to USSG §5K2.8, which punishes extreme conduct which was unusually heinous, cruel, degrading, or brutal to the victim. In this case, the court properly departed based on the defendant's deliberate false statements that he knew the whereabouts of the body of a missing 8-year-old girl and the identity of her assailant. The focus is on whether the defendant's actions were "unusually cruel or degrading within the universe of obstruction of justice and lying to the FBI and the grand jury." The crimes for which the defendant was sentenced "do not account for extreme cruelty or degradation." The district court properly departed.

United States v. Quintero, 21 F.3d 885 (9th Cir. 1994). The district court did not err in departing upward based on USSG §5K2.8, but its failure to adequately explain the extent of the departure warranted a remand. The defendant argued that a departure for extreme conduct did not apply to acts committed after the victim died. The Ninth Circuit concluded that the heinous treatment of the victim's body clearly fell within the scope of "extreme conduct." Further, even if departures based on extreme conduct were limited to live victims, an upward departure would nonetheless be warranted under USSG §5K2.0 because there is no evidence that the Commission considered acts as extreme as the defendant's when it promulgated the guideline for voluntary manslaughter. *See* USSG §2A1.3. However, since the district court did not fully explain the reason for "the extent of its departure with reference to the structure, standards, and policies of the Act and the guidelines," United States v. Hicks, 997 F.2d 594 (9th Cir. 1993); United States v. Lira-Barraza, 941 F.2d 745 (9th Cir. 1991) (*en banc*), remand was necessary.

§5K2.10 Victim's Conduct (Policy Statement)

See United States v. Ullyses-Salazar, 28 F.3d 932 (9th Cir. 1994), *cert. denied*, 514 U.S. 1020 (1995), §5K2.0, p. 34.

CHAPTER SIX: *Sentencing Procedures and Plea Agreements*

Part A Sentencing Procedures

§6A1.3 Resolution of Disputed Factors

United States v. Pinto, 48 F.3d 384 (9th Cir.), *cert. denied*, 516 U.S. 841 (1995). The district court did not err in considering at the defendant's sentencing hearing evidence that was not included in either the stipulation of facts in his plea agreement or the sentencing report. The district court judge had considered testimony relating to a delivery of cocaine based on the judge's own recollection of evidence presented at a codefendants' trial. The defendant argued that consideration of this testimony was improper because he was not given notice that it would be used against him at his sentencing hearing. The circuit court acknowledged that the evidence to which the defendant objected clearly came from his codefendants' trial. However, because the defendant made no objections to use of this evidence at his sentencing hearings, did not challenge the substance of the evidence on appeal, and because the district court relied on evidence of

numerous other incidents, the circuit court ruled that consideration of the disputed evidence did not constitute plain error.

CHAPTER SEVEN: *Violations of Probation and Supervised Release*

Part B Probation and Supervised Release Violations

§7B1.3 Revocation of Probation or Supervised Release (Policy Statement)

United States v. Donaghe, 50 F.3d 608 (9th Cir. 1994). The district court did not err in imposing a three-year term of supervised release upon resentencing the defendant after probation revocation. The circuit court, citing the Ninth Circuit decision in United States v. Behnezhad, 907 F.2d 896 (9th Cir. 1990), reasoned that the controlling statute for resentencing after probation revocation, 18 U.S.C. § 3565, allows for greater flexibility than resentencing after revocation of supervised release under 18 U.S.C. § 3583, which does not allow the imposition of a new term of supervised release. Thus, the circuit court held, the district court was permitted to structure a new sentence that included supervised release.

United States v. Plunkett, 94 F.3d 517 (9th Cir. 1996). In sentencing a defendant who had violated the terms and conditions of his probation, the district court did not err in returning to the original guideline range after concluding that the Guidelines Manual Chapter 7 policy statement ranges of 6 to 12 months for probation violation were inadequate. The defendant had contacted the FBI and confessed to robbing a bank several years earlier. In recognition of his voluntary disclosure, the district court departed downward pursuant to §5K2.16 and placed the defendant on probation. After testing positive for heroin, the defendant's probation was revoked. In sentencing the defendant, the district court returned to the original guideline range of 57-71 months, and departed downward to 46 months imprisonment. On appeal, the defendant argued that the 1994 amendments to 18 U.S.C. §§ 3553 and 3565 render mandatory the suggested imprisonment sentences for probation violators in the Chapter 7 policy statements. The court held that although section 3553 incorporates the policy statements by name, it does so in the disjunctive: "a sentencing court may consider the guidelines or the policy statements." More recent Ninth Circuit decisions have tended to recast Plunkett, citing it generally for the proposition (consistent with the Chapter Seven policy statements) that if a district court finds that a defendant violated a condition of probation, it may "revoke probation and impose any sentence that initially could have been imposed. *See* United States v. Nieblas, 115 F.3d 703 (9th Cir. 1997). Nieblas cites Plunkett as holding that the trial court has "discretion to sentence a probation violator to the range of sentences available at the time of the original sentencing." The court of appeals has since held that, when the district court imposes a sentence after revoking probation, it must consider the relevant guideline policy statements. *See*, *e.g.*, Nieblas; United States v. Hyde, 92 F.3d 779, 780 n.2 (9th Cir. 1996), *cert. granted, reversed on other grounds*, 117 S. Ct. 1630 (1997).

§7B1.4 Term of Imprisonment (Policy Statement)

See United States v. Carper, 24 F.3d 1157 (9th Cir. 1994), Rule 32, p. 40.

CHAPTER EIGHT: *Sentencing of Organizations*

Part C Fines

§8C3.3 Reduction of Fine Based on Inability to Pay

United States v. Eureka Laboratories, 103 F.3d 908 (9th Cir. 1996). The district court did not err in imposing a $1.5 million fine on the defendant organization. No statute or guideline precludes imposition of a fine on a defendant organization merely because it jeopardizes their continued viability. The defendant argued that the district court's determination of the restitution amount was contrary to USSG §8C3.3 in that the amount imposed had potentially devastating implications to the corporation. The circuit court disagreed, and held that USSG §8C3.3 permits, but does not require, a court to reduce a fine upon a finding that the defendant organization is not able to pay it. The only time that a fine reduction is mandated by §8C3.3 is when the amount of the fine would impair the defendant's ability to pay restitution to the victim(s). In the instant case, the defendant organization was able to make restitution to the government, therefore, the plain language of USSG §8C3.3 did not require the district court to further reduce the fine.

APPLICABLE GUIDELINES/EX POST FACTO

United States v. Canon, 66 F.3d 1073 (9th Cir. 1995). The district court violated the ex post facto clause when it considered a provision which was not a part of the 1989 version of the guidelines in calculating the defendant's base offense level. The defendant qualified as an Armed Career Criminal pursuant to 18 U.S.C. § 924(e) which carried a 15-year mandatory minimum sentence. The 1989 version of the guidelines, however, did not mention the Armed Career Criminal Act. The district court departed upward for a number of factors including the defendant's extensive criminal history, and used the armed career criminal section in the 1990 version of the guidelines as a guide in reaching a base offense level of 34, resulting in a sentence of 327 months imprisonment. The circuit court ruled that a departure for violent offenses already considered in calculating the defendant's criminal history is an impermissible basis for departure. The circuit court noted that under the 1989 guidelines, "any upward departure founded on the underrepresented seriousness of their past criminal conduct could not be based merely on the violence of the past crime, and had to be `horizontal'. . . ." The circuit court ruled that although the 1990 version of the guidelines provided for an enhanced offense level for armed career criminals, the district court improperly used USSG §4B1.4 as a guide, subjecting the defendant to the "detrimental ex post facto effect" of USSG §4B1.4. The circuit court rejected the Tenth Circuit's stand on this issue. The Tenth Circuit, in United States v. Tisdale, 7 F.3d 957, 965-68 (10th Cir. 1993), *cert. denied*, 510 U.S. 1169 (1994), permitted the use of USSG 4B1.4 as a retroactive guide to discretion, ruling that such practice did not violate the ex post facto clause because the court "made it clear that it was not applying the later Guideline, but only using it as a benchmark or analogue."

United States v. Guzman-Bruno, 27 F.3d 420 (9th Cir.), *cert. denied,* 513 U.S. 975 (1994). The district court did not violate the Ex Post Facto Clause when it sentenced the

defendant for being a deported alien found in the United States in violation of 8 U.S.C. § 1326. The defendant argued that he committed his offense in 1990 when he reentered the United States after being deported and reported to his state parole officer under a different name, rather than when he was found by the INS agent in 1992. Thus, he claimed that the sentencing judge should have used the 1990 version of the guidelines because the 1992 version imposes harsher penalties. The circuit court did not find any Ex Post Facto violation. A violation of 8 U.S.C. § 1326 is a continuing offense, and the violation continued until he was arrested in 1992.

See United States v. Kienenberger, 13 F.3d 1354 (9th Cir. 1994), §2T1.1, p. 13.

CONSTITUTIONAL CHALLENGES

Fifth Amendment—Double Jeopardy

United States v. Caterino, 29 F.3d 1390 (9th Cir. 1994), *overruled by* Witte v. United States, 515 U.S. 389 (1995), and United States v. Jernigan, 60 F.3d 562 (9th Cir. 1995). The defendant was convicted of 22 counts of conspiracy, mail fraud, and wire fraud. Thirteen of the 22 counts occurred before November 1, 1987. The district court provided a sentence for the preguideline offenses and a sentence for the guideline offenses and ordered them to run consecutively. Relying on United States v. Niven, 952 F.2d 289 (9th Cir. 1991), the defendant argued that his sentence violates the double jeopardy clause because the amount of loss is counted twice, once to determine his preguideline sentence and again, to determine his post-guideline sentence. To avoid this double jeopardy clause violation, the defendant argued, the district court must either apportion the losses attributable to each group or run the sentences concurrently. The circuit court agreed and reversed and remanded the sentence.

United States v. Jernigan, 60 F.3d 562 (9th Cir. 1995). The district court did not violate the double jeopardy clause in sentencing the defendant to consecutive sentences. The defendant failed to appear at trial for counterfeiting and conspiracy charges, and the district court enhanced his sentence for "obstruction of justice" by 2 levels under USSG §3C1.1. The defendant was separately indicted for failure to appear under 18 U.S.C. § 3146(a)(1), and sentenced to five months on the charge to run consecutively to his sentence for the counterfeit and conspiracy charges. The defendant argued that he was already punished for his failure to appear by the enhancement applied to his earlier sentence, and that the sentence violated double jeopardy. The circuit court, relying on Witte v. United States, 515 U.S. 389 (1995), concluded that the subsequent imposition of a consecutive sentence for the defendant's failure-to-appear offense was not a double jeopardy violation where that offense had been taken into account for previous sentencing on the counterfeit and conspiracy charges. The circuit court stated "[b]ecause the defendant's punishment in the first case fell "within the range authorized by statute," his double jeopardy claim necessarily fails."

Fifth Amendment—Due Process

See United States v. Carper, 24 F.3d 1157 (9th Cir. 1994), Rule 32.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 11

United States v. Kennell, 15 F.3d 134 (9th Cir. 1994). The district court's failure to provide the defendant with a Fed. R. Crim. P. 11(e) warning amounted to reversible error. The defendant entered a plea agreement pursuant to Fed. R. Crim. P. 11(e)(1)(B). Pleas entered pursuant to subsection (B) are not binding upon the sentencing court and, unlike type (A) or type (C) agreements, may not be withdrawn. The defendant challenged the propriety of his plea based on the court's failure to warn him of the nature of Type B agreements, a warning required by Rule 11(e)(2). The Ninth Circuit rejected the government's argument that the court's failure to advise amounted to harmless error. Rule 11 ensures that the defendant understands what he is giving up by pleading guilty, and failure to comply with Rule 11 is harmless only when it is clear from the record that the defendant actually knew the consequences of his plea. Fed. R. Crim. P. 11(h). Although the defendant acknowledged that he was waiving various rights by entering the plea, understood the maximum penalties that he faced, and stated that he read the contents of his plea, that does not mean he understood its implications. The court's general questioning did not establish that the defendant would have entered the guilty plea had he known of the limitations imposed by a Type B agreement. Accordingly, the court of appeals remanded with orders to withdraw the defendant's plea.

Rule 32

United States v. Carper, 24 F.3d 1157 (9th Cir. 1994). In addressing an issue of first impression, the Circuit Court held that a district court must afford a defendant the right to allocution under Federal Rule of Criminal Procedure 32(a)(1) when imposing a term of imprisonment after revoking supervised release. The court held that "allocution is a right guaranteed by the due process clause of the Constitution."

United States v. Hinojosa-Gonzalez, 142 F.3d 1122 (9th Cir. 1998). The district court erred by departing upward based on grounds of which the defendant did not receive adequate notice. Although the defendant knew the court might depart based on criminal history, the court ultimately departed on other grounds—a combination of prior unpunished criminal conduct and extraordinary drug quantity—which were not advanced until the sentencing hearing. The court of appeals emphasized that the defendant is entitled to notice of both the factual an legal grounds for upward departure.

Rule 35

See United States v. Mukai, 26 F.3d 953 (9th Cir. 1994), Ch. 1, Pt. A, p. 1.

United States v. Portin, 20 F.3d 1028 (9th Cir. 1994). The district court exceeded its authority under Fed. R. Crim. P. 35 when it increased the defendants' fines at resentencing. The defendants' original sentencing was vacated because of Fed. R. Crim. P. 11(e) violations. On remand, the sentencing court not only corrected the terms of the defendants' sentences to conform to their plea agreements, but also increased the fines originally imposed. However, Fed. R. Crim.

P. 35 authorizes only the correction of sentences that were imposed illegally; thus the district court is not permitted to reconsider or reopen issues which were resolved at the initial sentencing. Since there were no errors as to the defendants' fines, the circuit court vacated and remanded for further action.

OTHER STATUTORY CONSIDERATIONS

18 U.S.C. § 924

United States v. Harris, 154 F.3d 1082 (9th Cir. 1998). After being found guilty of multiple counts of armed robbery and use of a firearm during and in relation to a crime of violence, the defendants were sentenced to the statutory mandatory minimums 1,141 months (95 years) and 597 months (49.75 years) respectively. The defendants argued that these sentences constitute cruel and unusual punishment in violation of the Eighth Amendment. The court of appeals rejected the defendants' contention that the sentences violate the Eighth Amendment because they are disproportionate to their crimes. Armed robberies are extremely dangerous crimes. Moreover, Congress mandated the sentences, and a sentence which is within the limits set by a valid statute may not be overturned as cruel and unusual. The court has previously upheld the section 924(c) mandatory minimums and upheld multiple consecutive sentences under the statute. The state has a legitimate interest in treating repeat offenders more severely than first offenders. Thus, the court of appeals sated it could not find the defendants' sentences grossly disproportionate to their crimes. The court did express concern that some level of discretion should be vested with the courts to consider mitigating circumstances in cases such as these, and urged Congress to reconsider the harsh scheme of mandatory minimums.

See United States v. Phillips, 149 F.3d 1026 (9th Cir. 1998), §4B1.4, p. 23.

21 U.S.C. § 841

United States v. Oakes, 11 F.3d 897 (9th Cir. 1993), *cert. denied*, 511 U.S. 1043 (1994). The circuit court affirmed the mandatory minimum sentence of five years imprisonment for a first offender, noting that the 100 plus marijuana plants seized were "barely sufficient to trigger [21 U.S.C.] § 841's statutory minima." The court noted that, had the prosecutor filed in state court, the sentence as a first offender "would have been 0-90 days." "As this case demonstrates, the mandatory minima do not eliminate either discretion or disparity in sentencing, they merely shift discretion from judges to prosecutors." The court noted that the district court originally departed to a sentence of probation, characterizing the defendant's crime as "aberrant behavior." Upon the government's appeal, the departure was reversed, and the district court reluctantly imposed the mandatory sentence at issue. The circuit court also commented on the fact that the government had not appealed certain other cases with legally improper departures from mandatory minima, and was in effect exercising prosecutorial discretion by choosing when to appeal such sentences.

United States v. Rodriguez-Sanchez, 23 F.3d 1488 (9th Cir. 1994). In addressing an issue of first impression, the circuit court reversed the district court's imposition of the ten-year

mandatory statutory sentence for possession of methamphetamine with intent to distribute, 18 U.S.C. § 841(b)(1)(A), which was based on the entire amount of methamphetamine found in the defendant's possession at the time of his arrest. The defendant argued that he only intended to distribute a portion of the amount he possessed and that his sentence should have been based only on this amount. The circuit court agreed. Section 841(a) of Title 21 criminalizes distribution, not mere possession, which is covered by other statutes. *See* 21 U.S.C. § 844. Relying on the principle announced in United States v. Kipp, 10 F.3d 1463 (9th Cir. 1993), for a sentence governed by the guidelines ("[d]rugs possessed for mere personal use are not relevant to the crime of possession with intent to distribute because they are not `part of the same course of conduct' or `common scheme' as drugs intended for distribution"), the circuit court held that the sentence for possession with intent to distribute a narcotic substance, under the statutory penalty provisions of 21 U.S.C. § 841(b)(1)(A), should also be based only on the amount intended for distribution. Accordingly, the defendant's sentence was vacated and remanded for a factual determination of the amount of methamphetamine the defendant intended to distribute.